Docket for 02-1183

No. 02-1183	Status: ARGUED
Title:	United States, Petitioner v. Samuel Francis Patane
Docketed:	February 12, 2003
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Nos.:	(01-1503)
Decision Date:	September 17, 2002
Rehearing Denied:	December 9, 2002

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Feb 12 2003	Petition for writ of certiorari filed. (Response due March 14, 2003)
Mar 14 2003	Brief of respondent Samuel Francis Patane in opposition filed.
Mar 14 2003	Motion for leave to proceed in forma pauperis filed by respondent Samuel Francis Patane.
Apr 14 2003	Reply of petitioner United States filed.
Apr 21 2003	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Apr 21 2003	Petition GRANTED.
May 16 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including July 7, 2003.
Jun 26 2003	Further extension of time within which to file the joint appendix and petitioner's brief on the merits to and including July 14, 2003.
Jul 7 2003	Brief amici curiae of Alabama, et al. filed.
Jul 7 2003	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Jul 14 2003	Joint appendix filed.
Jul 14 2003	Brief of petitioner United States filed.
Aug 5 2003	Extension of time within which to file respondent's brief on the merits to and including September 17, 2003.
Sep 15 2003	Brief amicus curiae of National Association of Criminal Defense Lawyers, et al. filed.
Sep 17 2003	Brief of respondent Samuel Francis Patane filed.
Sep 17 2003	Brief amicus curiae of Brennan Center for Justice filed.
Sep 24 2003	SET FOR ARGUMENT Tuesday, December 9, 2003
Oct 3 2003	CIRCULATED.
Oct 9 2003	Record received from the U.S.C.A. for the 10th Circuit. (1 envelope)
Oct 22 2003	Reply of petitioner United States filed. (Distributed)
Nov 3 2003	Record received from the U.S.D.C. for Colorado. (1 envelope - portion of the record is sealed))
Dec 9 2003	Argued. For petitioner: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washinton, D.C. For respondent: Jill M. Wichlens, Assistant Federal Public Defender, Denver, Colo.

02-1183 JAN 12 2003

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SAMUEL FRANCIS PATANE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a failure to give a suspect the warnings prescribed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), requires the suppression of physical evidence derived from the suspect's unwarned but voluntary statement.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 304 F.3d 1013.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2002. A petition for rehearing was denied on December 9, 2002 (App., *infra*, 34a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

On June 19, 2001, a grand jury sitting in the District of Colorado indicted respondent for possession of a firearm after having previously been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). The district court granted respondent's motion to suppress the firearm. The court of appeals affirmed. App., *infra*, 1a-33a.

1. On June 6, 2001, Officer Tracy Fox of the Colorado Springs Police Department arrested respondent outside his residence for violating a domestic violence restraining order. Shortly thereafter, Detective Josh Benner, who was part of a gun interdiction task force of the Bureau of Alcohol, Tobacco, and Firearms and who had been told by a probation officer that respondent was a convicted felon and possessed a Glock .40 pistol, began reading respondent his *Miranda* rights. After he was advised of his right to remain silent, respondent told the detective that he knew his rights. At that point, Detective Benner stopped reading the *Miranda* warnings. App., *infra*, 2a-4a.

Detective Benner asked respondent what guns he owned, and respondent replied that a .357 was already in police custody. Benner asked respondent about the Glock pistol, and respondent said that the pistol was on a wooden shelf in his bedroom. Respondent gave Benner permission to retrieve the pistol, and Benner went into the residence, found the pistol on the shelf, and seized it. App., *infra*, 4a.

2. The district court granted respondent's motion to suppress the firearm, ruling that the police officers lacked probable cause to arrest respondent for violating the domestic violence restraining order. App., *infra*, 1a. The court did not rule on respondent's alternative argument that the firearm should be suppressed as the

fruit of an unwarned statement by respondent. *Id.* at 11a. The government appealed.

3. The court of appeals affirmed. App., *infra*, 1a-33a. The court reversed the district court's ruling that respondent's arrest was not supported by probable cause. *Id.* at 5a-9a. The court nevertheless affirmed the district court's suppression order on the alternative ground that the firearm was inadmissible as the fruit of a statement obtained without *Miranda* warnings. *Id.* at 10a-33a.

The court acknowledged that this Court in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), and *Oregon* v. *Elstad*, 470 U.S. 298 (1985), had "declined to apply the fruits of the poisonous tree doctrine of *Wong Sun* v. *United States*, 371 U.S. 471, 485 (1963), to suppress evidence obtained from an un-Mirandized confession." App., *infra*, 11a-12a (citation omitted). The court also acknowledged that in *United States* v. *McCurdy*, 40 F.3d 1111 (10th Cir. 1994), it had previously read *Elstad* and *Tucker* to prohibit the suppression of physical evidence obtained as a result of a defendant's unwarned statement except when the statement was not voluntary. App., *infra*, 19a. The court concluded, however, that this Court's holding in *Dickerson* v. *United States*, 530 U.S. 428 (2000), that *Miranda* is a constitutional rule "undermined the logic underlying *Tucker* and *Elstad*." App., *infra*, 13a. The court therefore held that it was not bound by its prior decision in *McCurdy*. *Id.* at 19a-20a.

Examining the issue anew, the court concluded that neither *Elstad* nor *Tucker* supports the proposition that *Miranda* permits the introduction of derivative physical evidence when the defendant's unwarned statement was voluntary. App., *infra*, 15a-21a. The court emphasized that *Tucker* involved an interrogation

that occurred before *Miranda* was decided, and read *Tucker* as resting "largely on [the] conclusion that excluding the fruits of [the unwarned] confession would have minimal prophylactic effect because the officers were acting in complete good faith under prevailing pre-*Miranda* law." *Id.* at 13a. The court distinguished *Elstad* on the ground that the evidence derived from the unwarned statement in *Elstad*—subsequent voluntary statements made by the defendant after the administration of *Miranda* warnings—was a product of the defendant's volition. *Id.* at 16a-18a.

The court acknowledged that "[c]ourts applying [*Dickerson*] have split on the proper application of *Wong Sun* to the physical fruits of a *Miranda* violation." App., *infra*, 20a. Rejecting the approaches of the Third Circuit in *United States* v. *DeSumma*, 272 F.3d 176 (2001), cert. denied, 122 S. Ct. 1631 (2002), and the Fourth Circuit in *United States* v. *Sterling*, 283 F.3d 216, cert. denied, 122 S. Ct. 2606 (2002), the court decided that a deterrence rationale required the suppression of physical evidence derived from statements made by a suspect who had not been given *Miranda* warnings. App., *infra*, 21a-28a. Rejecting the approach of the First Circuit in *United States* v. *Faulkingham*, 295 F.3d 85 (2002), petition for cert. pending, No. 02-7385 (filed Oct. 7, 2002), the court also decided that the suppression of derivative physical evidence was required even when a police officer's failure to comply with *Miranda* was negligent rather than intentional. App., *infra*, 28a-33a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that a failure to give the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), mandates not only that the defendant's unwarned statement be excluded from the prosecution's case-in-chief, but also that any physical evidence derived from that unwarned statement be suppressed. That holding is incorrect and significantly departs from this Court's *Miranda* jurisprudence. In concluding that physical evidence that is the "fruit" of an unwarned statement must be suppressed, the court also created a conflict among the circuits on an important constitutional issue that arises with regularity. The resolution of that issue directly affects the administration of criminal law in the federal and state courts. This Court's review is warranted.

A. The Fruits Of Unwarned Statements Are Admissible Under This Court's *Miranda* Decisions

The *Miranda* rule generally bars unwarned statements taken during custodial interrogation from being introduced into evidence in the government's case-in-chief. This Court's cases, however, do not mandate that evidence that is the fruit of a statement obtained without *Miranda* warnings—such as respondent's firearm in this case—must be suppressed. To the contrary, the Court's decisions in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), and *Oregon* v. *Elstad*, 470 U.S. 298 (1985), held that fruits of unwarned statements were admissible. Far from casting doubt on that conclusion, the Court's decision in *Dickerson* v. *United States*, 530 U.S. 428 (2000), expressly relied on the continuing validity of that principle, and it specifically rejected the contention that a broad fruits rule—such as that adopted by the court of appeals—should be applied in cases in which law enforcement agents fail to give a suspect *Miranda* warnings.

Before *Miranda*, in *Wong Sun* v. *United States*, 371 U.S. 471 (1963), this Court had held that evidence dis-

covered as a result of a search in violation of the *Fourth* Amendment constitutes the "fruit of the poisonous tree" and must be excluded from evidence. In *Tucker* and *Elstad*, however, the Court declined to apply the *Wong Sun* fruits doctrine to suppress evidence obtained as a result of statements made by a suspect who had not been given *Miranda* warnings. In *Tucker*, the Court held that the testimony of a witness who was discovered as a result of a statement obtained from a defendant who had not received complete *Miranda* warnings did not have to be suppressed as the fruit of the unwarned statement. 417 U.S. at 446-452. In *Elstad*, the Court held that a voluntary statement obtained from a defendant who had not been given *Miranda* warnings did not preclude admission of the defendant's later statement given after *Miranda* warnings, so long as the initial statement was voluntary. 470 U.S. at 317-318. The Supreme Court reasoned in *Elstad* that "a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the fruits doctrine." *Id.* at 306. The Court explained that "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion." *Id.* at 307. But "the *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements *and their fruits* be discarded as inherently tainted." *Ibid.* (emphasis added). To the contrary, the Court concluded that *Tucker* "was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed" and stated that "this reasoning applies with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation is neither a witness [as in *Tucker*] nor an article of evidence but the accused's own voluntary testimony [as in *Elstad*]." *Id.* at 308.

In *Dickerson*, the Court held that the *Miranda* rule—that certain warnings must be given if a suspect's statements made during custodial interrogation are to be admitted in the government's case-in-chief—was a "constitutional decision" that could not be overruled by an Act of Congress, 18 U.S.C. 3501. 530 U.S. at 432. In reaching that conclusion, the Court referred specifically and approvingly to *Elstad*'s rejection of the *Wong Sun* fruits rule:

> Our decision in [*Elstad*]—*refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases*—does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.

Id. at 441 (emphasis added).

Dickerson did not alter the settled law announced in *Elstad* that limited the scope of the *Miranda* exclusionary rule. Indeed, the doctrine of stare decisis was integral to the holding in *Dickerson*. 530 U.S. at 444 ("Following the rule of *stare decisis*, we decline to overrule *Miranda*."). The Court also placed critical reliance on the continuing validity of its post-*Miranda* cases, which include *Tucker* and *Elstad*. The Court explained that those cases had "reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief." *Id.* at 443-444.

Dickerson thus preserved the distinction in this Court's cases between the rules limiting the admissi-

bility of unwarned statements in the government's case-in-chief and the rules permitting the admissibility of fruits of an unwarned statement. Aside from cases involving an exception, see *New York* v. *Quarles*, 467 U.S. 649 (1984), unwarned statements are inadmissible as evidence in the prosecution's case-in-chief. Under the principles of *Tucker* and *Elstad*, however, the fruits of those statements are admissible so long as the unwarned statement was voluntary. The court of appeals erred in reading *Dickerson* to undermine—rather than to reaffirm—this Court's past decisions under *Miranda*.

B. The Court Of Appeals Misunderstood The Rationale Of This Court's *Miranda* Decisions And The Teachings Of Those Decisions About The Scope Of The *Miranda* Exclusionary Rule

The court of appeals' error rested on two fundamental mistakes. First, the court believed that *Elstad* "drew a distinction between fruits consisting of a subsequent confession by the defendant after having been fully *Mirandized*," which need not be surpressed, and "fruits consisting of subsequently obtained 'inanimate evidentiary objects,'" which (it held) must be suppressed. App., *infra*, 16a. Although the court acknowledged that what it termed "dicta elsewhere in the opinion [in *Elstad*] has been cited for the contrary conclusion," the court stated that "*Elstad*'s holding indicates that the physical fruits of a *Miranda* violation are subject to the *Wong Sun* fruits doctrine." *Id.* at 17a. *Elstad*'s rationale, however, cannot be squared with that reasoning. While *Elstad* did note that the second statement in that case was the product of the suspect's "own volition," 470 U.S. at 308, *Elstad* more broadly rejected the proposition that the *Wong Sun* doctrine applies to the fruits of a statement obtained without

Miranda warnings. The Court reached that conclusion by explaining that while an "irrebuttable" presumption of coercion exists when the government seeks to introduce an unwarned statement in its case-in-chief, no such presumption exists to bar the admission of "the statements *and their fruits*" in other contexts. *Id.* at 307 (emphasis added).

Second, in fashioning its own exclusionary rule to bar the physical fruits of a statement obtained without *Miranda* warnings, the court of appeals misapplied this Court's teachings. In *Tucker* and *Elstad*, the Court identified two rationales for excluding evidence in the *Miranda* context—"deterring improper police conduct" and "assuring trustworthy evidence." *Elstad*, 470 U.S. at 308. See *Tucker*, 417 U.S. at 447-449. The court of appeals in this case, however, limited its consideration to the deterrence rationale, see App., *infra*, 26a-27a, and it misapplied that rationale by holding that the interest in deterring even negligent failures to issue *Miranda* warnings, as happened here, justifies exclusion of physical evidence. *Id.* at 27a, 31a.

Under a correct application of this Court's precedents, physical evidence, such as the gun seized in this case, undoubtedly constitutes reliable, trustworthy evidence. Thus, admitting it into evidence does not implicate *Miranda*'s concern to protect the truth-seeking process. Cf. *Withrow* v. *Williams*, 507 U.S. 680, 692 (1993) ("*Miranda* serves to guard against 'the use of unreliable statements at trial.'"). Rather, suppression of that physical evidence undermines the truth-seeking process. Nor do deterrence concerns justify suppressing not only the unwarned statement but also its fruits. Suppression of the statement itself in the government's case-in-chief is sufficient. Cf. *New York* v. *Quarles*, 467 U.S. 649, 669 (1984) (O'Connor, J., concurring) ("The

harm caused by failure to administer *Miranda* warnings relates only to admission of testimonial self-incriminations, and the suppression of such incriminations should by itself produce the optimal enforcement of the *Miranda* rule."). The court of appeals erred, therefore, in concluding that a failure to give *Miranda* warnings requires the suppression of physical evidence derived from an unwarned, but otherwise voluntary, statement made by a defendant.

C. The Decision Of The Court Of Appeals Conflicts With Recent Decisions Of The First, Third, and Fourth Circuits

The court of appeals' holding that a failure to give *Miranda* warnings requires the suppression of derivative physical evidence conflicts with the decisions of the three other courts of appeals that have also considered the impact of *Dickerson* on *Elstad* and *Tucker*. In direct conflict with the court's holding in this case, both the Third and Fourth Circuits have held, after *Dickerson*, that a failure to give *Miranda* warnings never requires the suppression of physical evidence derived from a defendant's unwarned but otherwise voluntary statement.

In *United States* v. *DeSumma*, 272 F.3d 176, 179-181 (2001), cert. denied, 122 S. Ct. 1631 (2002), the Third Circuit upheld the admission of a gun found as a result of a voluntary statement made by the defendant before he was given *Miranda* warnings. The court held that "the fruit of the poisonous tree doctrine does not apply to derivative evidence secured as a result of a voluntary statement obtained before *Miranda* warnings are issued." *Id.* at 180. Based on *Dickerson*'s discussion of *Elstad*, the Third Circuit concluded that *Dickerson* "continued to observe the distinction between

Miranda's application to cases involving the Fifth, rather than the Fourth, Amendment." *Id.* at 179.

In *United States* v. *Sterling*, 283 F.3d 216, 218-219, cert. denied, 122 S. Ct. 2606 (2002), the Fourth Circuit similarly upheld the admission of a gun found as a result of a voluntary statement made by the defendant before he was given *Miranda* warnings. The Fourth Circuit relied on its prior decision in *United States* v. *Elie*, 111 F.3d 1135, 1142 (1997), which had held that "derivative evidence obtained as a result of an unwarned statement that was voluntary under the Fifth Amendment is never 'fruit of the poisonous tree.'" The Fourth Circuit concluded in *Sterling* that "the distinction [drawn in *Tucker* and *Elstad*] between statements and derivative evidence survives *Dickerson*," 283 F.3d at 219, and that "*Dickerson* does not overrule *Tucker* or *Elstad*, and our holding in *Elie*, based on those two cases, survives." *Ibid.*

The court of appeals' holding that the failure to give *Miranda* warnings always requires the suppression of derivative physical evidence also conflicts with the First Circuit's decision in *United States* v. *Faulkingham*, 295 F.3d 85 (2002), petition for cert. pending, No. 02-7385 (filed Oct. 7, 2002). In that case, the First Circuit used a case-by-case approach that requires the suppression of derivative physical evidence only when the need for deterrence outweighs the reliability of the evidence in the particular case. The First Circuit in *Faulkingham* upheld the admission of drugs and the testimony of a witness discovered as a result of voluntary statements made by the defendant who was not given *Miranda* warnings. The First Circuit recognized that "[t]he various differences in purpose behind the Fourth and Fifth amendments, articulated in *Elstad*, continue unchanged by *Dickerson*, and those dif-

ferences affect the remedial options appropriate for violations of the two distinct constitutional amendments, and, more specifically, for violations of the *Miranda* rule." *Id.* at 93. (Contrary to the court of appeals' reading of *Faulkingham* in this case, the First Circuit clearly did not conclude in *Faulkingham* that "*Dickerson* alters the analysis regarding suppression of the fruits of a *Miranda* violation." App., *infra*, 29a.) The First Circuit went on to follow its pre-*Dickerson* decision in *United States* v. *Byram*, 145 F.3d 405 (1998), which had declined to adopt a flat rule that a failure to give *Miranda* warnings may never lead to the suppression of derivative evidence. *Faulkingham*, 295 F.3d at 90-91. The First Circuit held that suppression was unwarranted on the facts of *Faulkingham*, in which the officers in the heat of a fast-moving drug arrest had simply neglected to give *Miranda* warnings to an arrestee who volunteered information. The First Circuit ruled that the evidence should not be suppressed because, in those circumstances, "the reliability of the unwarned derivative evidence" outweighed "the need for deterrence." *Id.* at 93-94.*

* The defendant in *Faulkingham* has also filed a petition for a writ of certiorari (No. 02-7385), but this case presents a more suitable vehicle for resolution of the constitutional issue. Like the Third Circuit in *DeSumma* and the Fourth Circuit in *Sterling*, the First Circuit in *Faulkingham* concluded that this Court's decision in *Dickerson* did not change the law on whether the fruits of a statement obtained without *Miranda* warnings must be suppressed. The court of appeals in this case stands alone in concluding that "the premise upon which *Tucker* and *Elstad* relied was fundamentally altered in *Dickerson*." App., *infra*, 12a. Moreover, the result in this case—the suppression of evidence—is at odds with the results of the decisions of the other courts of appeals, while the result of the First Circuit's decision in *Faulkingham* is consistent with the results of the Third Circuit's decision in *DeSumma* and the Fourth Circuit's decision in *Sterling*. Accordingly, further review is appropriate in this case rather than *Faulkingham*, and the petition in *Faulkingham* should be held pending disposition of the petition in this case.

D. The Question Presented Is Important

The court of appeals' decision bears on an important issue in federal criminal law. In a variety of cases, officers, for one reason or another, may fail to deliver fully the warnings set forth in *Miranda*. Here, for example, the suspect himself cut off the officer's attempt to advise him of his *Miranda* rights, saying that he already knew his rights. In other cases, warnings may be omitted during a fast-moving investigation. The question whether *Miranda* requires exclusion not only of the suspect's unwarned statement but also its tangible fruits thus arises with some frequency. Cf. *Patterson* v. *United States*, 485 U.S. 922, 922-923 (1988) (White, J., dissenting from the denial of certiorari). Because the suppression of probative physical evidence in such cases imposes serious costs on the administration of justice, this Court's resolution of the conflict in the circuits is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-1503

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

SAMUEL FRANCIS PATANE, DEFENDANT-APPELLEE

Filed: Sept. 17, 2002

Before: EBEL, ANDERSON, and HENRY, Circuit Judges.

EBEL, Circuit Judge.

The Government appeals from the district court's order suppressing the physical evidence against Samuel Francis Patane on charges of gun possession by a felon. The district court based its suppression order on its conclusion that the evidence was insufficient to establish probable cause to arrest Patane. We conclude, contrary to the district court, that probable cause existed to arrest Patane. However, we affirm the district court's order on the alternative ground that the evidence must be suppressed as the physical fruit of a *Miranda* violation.

I. BACKGROUND

Patane was indicted for possession of a firearm by a convicted felon in violation of 18 U.S.C. 922(g)(1). The district court held a suppression hearing at which the police investigation leading to discovery of the gun was detailed. Ruling from the bench a week later, the court granted defendant's motion to suppress. Patane's arrest resulted from the intersection of two essentially independent investigations—one by Colorado Springs Detective Josh Benner regarding Patane's gun possession, and another by Colorado Springs Officer Tracy Fox regarding Patane's violation of a domestic violence restraining order.

The story begins when Patane was arrested for harassing and menacing his ex-girlfriend, Linda O'Donnell. He was released on bond from the El Paso, Colorado county jail on June 3, 2001, subject to a temporary restraining order. The restraining order is not in the record, but uncontroverted testimony indicates that it forbade Patane to contact O'Donnell, in person or by phone, directly or indirectly, in the 72 hours after his release on bond.

On June 6, an agent with the federal Bureau of Alcohol, Tobacco, and Firearms telephoned Detective Benner, a member of a local police drug interdiction unit that worked closely with the ATF. The agent said that a county probation officer had told him that Patane was a convicted felon who also had been convicted on a domestic violence charge, and that Patane possessed a Glock .40 caliber pistol. The record does not reveal how the probation officer knew that Patane had the gun. Detective Benner called O'Donnell to inquire about the

gun, and she told him that Patane had the pistol with him at all times.

Seemingly by coincidence, at the moment Benner called O'Donnell to ask about the gun, Officer Fox had arrived at O'Donnell's residence, responding to a call from O'Donnell about an alleged violation of the restraining order. O'Donnell told Officer Fox that two days earlier, O'Donnell received a hang-up call. Using the *69 feature on her telephone, O'Donnell learned that the call originated from a number that O'Donnell recognized as Patane's home telephone. This call violated Patane's restraining order, O'Donnell stated, and she showed Officer Fox a copy of the order. O'Donnell said that she was afraid for her safety, that she knew Patane regularly had a gun, and that Patane kept a list of people he wanted to kill. Officer Fox confirmed by computer that a restraining order had been issued.

Officer Fox did not confirm O'Donnell's use of the call tracing, although she had done so in a prior, unrelated case and thus was aware it was possible. Neither Officer Fox nor Detective Benner ran a criminal background check on O'Donnell prior to Patane's arrest, which Patane asserts would have revealed that O'Donnell was herself out on bond for carrying a concealed weapon, criminal trespass, theft, and criminal damage.

Detective Benner and Officer Fox then spoke by phone. Officer Fox said she planned to arrest Patane for violating the restraining order by calling O'Donnell, and the two arranged to go to Patane's house. Officer Fox knocked on the door while Detective Benner went out back in case Patane attempted to flee. The woman who answered the door summoned Patane. Officer Fox asked Patane to step outside, which he did. She asked him about the hang-up call, and Patane denied having

made the call or having contacted O'Donnell in any way. Officer Fox told Patane that he was under arrest and handcuffed him shortly afterward.

With Patane arrested and handcuffed, Detective Benner emerged from the back of the house and approached Patane. Detective Benner began advising Patane of his *Miranda* rights, but only got as far as the right to silence when Patane said that he knew his rights. No further *Miranda* warnings were given, a fact which the Government concedes on appeal resulted in a *Miranda* violation. Detective Benner told Patane he was interested in what guns Patane owned. Patane replied, "That .357 is already in police custody." Detective Benner said, "I am more interested in the Glock." Patane said he was not sure he should tell Detective Benner about the Glock pistol because he did not want it taken away. Detective Benner said he needed to know about it, and Patane said, "The Glock is in my bedroom on a shelf, on the wooden shelf." Detective Benner asked for permission to get the gun, which Patane granted, and Detective Benner went inside, found the gun where Patane described, and seized it. Detective Benner then told Patane, as the detective later testified, that "I wasn't going to arrest him for the gun at this time because I wanted to do some more investigations." Officer Fox took Patane to the police station and booked him for violating the restraining order.

The next day, Detective Benner met with Patane's probation officer and verified that Patane had a prior felony conviction for drug possession as well as a misdemeanor third degree assault conviction.

II. PROBABLE CAUSE

On appeal, the Government argues that the district court erred in concluding that the police lacked probable cause to arrest Patane for violating the domestic violence restraining order. We agree with the Government.

In reviewing the district court's probable cause determination, "we consider the evidence in a light most favorable to the district court's legal determinations, and review the court's findings of historical fact for clear error. Absent any finding of fact, we will uphold the court's legal determination if any reasonable view of the evidence supports it. We review the ultimate determinations of reasonable suspicion to stop and probable cause to arrest de novo." *United States* v. *Treto-Haro*, 287 F.3d 1000, 1002 (10th Cir. 2002) (citations omitted). We have articulated the substantive probable cause standard as follows:

> An officer has probable cause to arrest if, under the totality of the circumstances, he learned of facts and circumstances through reasonably trustworthy information that would lead a reasonable person to believe that an offense has been or is being committed by the person arrested. Probable cause does not require facts sufficient for a finding of guilt; however, it does require more than mere suspicion.

United States v. Morris, 247 F.3d 1080, 1088 (10th Cir. 2001) (internal quotation marks and citations omitted).

The district court's ruling that no probable cause existed to arrest Patane for violating the domestic violence restraining order was based on its view that domestic disputes often involve "claims and counterclaims

. . . thrown between people who have separated some sort of an intimate relationship," and therefore that uncorroborated allegations arising from such disputes are "just inadequate" to establish probable cause. Unexplored avenues of corroboration noted by the court were: the failure to check telephone records to confirm O'Donnell's allegation that a call had been placed from Patane's residence to hers during the time frame covered by the restraining order, "verification which presumably could have been done rather easily," the failure to investigate O'Donnell's credibility prior to the arrest, the failure to corroborate O'Donnell's accusations apart from Detective Benner's confirmation that Patane indeed possessed a gun, which "has nothing to do with the crime for which he was arrested," and the failure to determine whether persons other than Patane had access to Patane's telephone. The court also noted that "[i]t's just one contact which . . . could, in my life experience, have been an innocent mistake" because "people do make calls to numbers with which they are familiar, not intending to make the call," that Patane denied having contacted O'Donnell, and that O'Donnell delayed two days in reporting the call to the police.

We reject any suggestion that victims of domestic violence are unreliable witnesses whose testimony cannot establish probable cause absent independent corroboration. We have stated, "when examining informant evidence used to support a claim of probable cause for a . . . warrantless arrest, the skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from the criminal milieu, is appropriately relaxed if the informant is an identified victim or ordinary citizen witness." *Easton v. City of Boulder*, 776 F.2d 1441, 1449 (10th Cir. 1985); *see also*

Guzell v. Hiller, 223 F.3d 518, 519-20 (7th Cir. 2000) ("Police are entitled to base an arrest on a citizen complaint . . . of a victim . . . without investigating the truthfulness of the complaint, unless . . . they have reason to believe it's fishy." (citations omitted)). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 3.4(a), at 209-11 (3d ed. 1996) (noting that "[b]y far the prevailing view" is that corroboration is not essential in victim-witness cases, and arguing "that when an average citizen tenders information to the police, the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such may not be the case").

We find no basis for the suggestion that domestic violence victims are undeserving of the presumption of veracity accorded other victim-witnesses. Indeed, our decision in *Easton* forecloses such a position. In *Easton*, probable cause to arrest for child molestation was based on the accusations of two child witnesses, one five years old and the other three years old. We rejected as "an entirely unacceptable point of view" the argument that the children's testimony was suspect, stating:

> In a great many child molestation cases, the only available evidence that a crime has been committed is the testimony of children. To discount such testimony from the outset would only serve to discourage children and parents from reporting molestation incidents and to unjustly insulate the perpetrator of such crimes from prosecution.

Easton, 776 F.2d at 1449.[1] A strict corroboration requirement in domestic violence cases would create precisely the same proof problems we found dispositive in *Easton*.

In this case, neither the district court nor Patane point to any evidence in the record suggesting that O'Donnell lied about the purported hang-up call out of personal animosity against Patane arising from their failed relationship, let alone that the police were aware of such evidence at the time of arrest. For example, there was no evidence that O'Donnell had threatened to lie in such a manner, or that she had lied in such a manner in the past. To the contrary, there was evidence that Patane recently had been arrested for harassing and menacing O'Donnell after he threatened to kill her, that O'Donnell knew that Patane carried a gun and kept a list of persons (including police officers) he wanted to kill, and that O'Donnell feared that Patane would kill her. Admittedly, O'Donnell waited two days before reporting the hang-up call, a fact that could cast some doubt on the veracity of her report. However, we do not believe that fact alone was sufficient to require the officers to treat her complaint with special skepticism.

In any event, we note that the officers here did corroborate O'Donnell's veracity in two respects. First, the district court found as fact that, prior to the arrest, Detective Benner had learned from a probation officer that Patane possessed a gun. Second, Officer Fox verified that a restraining order had been issued against

[1] We noted in *Easton* that the accusations of the children contained "significant" discrepancies, and even noted the possibility that their testimony would be inadmissible in court due to an inability to understand the oath, yet we held that the children's accusations established probable cause. 776 F.2d at 1449-50.

Patane. The mere fact that further corroboration was possible is not dispositive of whether the information available would lead a reasonable person to believe that an offense had been committed.

At oral argument, Patane argued that, as a matter of law, a single hang-up phone call could not constitute a violation of the restraining order. We disagree. As noted above, the evidence showed that the restraining order forbade Patane to contact O'Donnell, directly or indirectly, in person or by telephone, and counsel for Patane conceded that multiple hang-up phone calls would amount to a violation of the restraining order. We find no basis to conclude that a single call is not "contact" with the victim, or that a single call does not implicate the same concerns about intimidation and harassment that multiple calls would. *Cf.* 42 U.S.C. § 376hh(a), (b)(1) ("encourag[ing] States . . . to treat domestic violence as a serious violation of criminal law" by authorizing Attorney General to make grants to implement "mandatory arrest or proarrest programs and . . . policies for protection order violations"). We acknowledge that it is conceivable that a single hang-up call might result from careless rather than willful behavior. However, probable cause does not require certainty of guilt or even a preponderance of evidence of guilt, but rather only reasonably trustworthy information that would lead a reasonable person to believe an offense was committed. *Morris*, 247 F.3d at 1088. The possibility that the hang-up call here was accidental does not defeat probable cause.

Accordingly, we conclude that Patane's arrest was supported by probable cause to believe that Patane had violated the domestic violence restraining order.[2]

III. SUPPRESSION OF THE PHYSICAL FRUITS OF A *MIRANDA* VIOLATION

Our conclusion that the district court erroneously based suppression of the gun on the absence of probable cause to arrest does not end our inquiry. Patane argues that suppression of the gun should be affirmed because, even if the arrest was proper, the ensuing *Miranda* violation independently requires suppression of the physical evidence.

The district held, and the Government concedes on appeal, that a *Miranda* violation occurred when the police questioned Patane about his possession of a gun without administering the complete *Miranda* warnings.

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[2] In light of our conclusion that the officers had probable cause to arrest for violation of the restraining order, it is unnecessary to reach the Government's alternative argument that the arrest was justified by probable cause to believe that Patane was a felon in possession of a gun. The district court declined to decide whether the officers had probable cause to arrest on the basis of Patane's gun violation. ("[T]o allow the arresting officers after the fact to go back and scramble . . . for evidence that might justify an arrest on another charge . . . would not be a good rule to establish . . . ."). On appeal, the Government argued that this reasoning is foreclosed by *United States* v. *Santana-Garcia*, 264 F.3d 1188, 1192-93 (10th Cir. 2001) (officer's subjective belief as to non-existence of probable cause not dispositive); *see also Treto-Haro*, 287 F.3d at 1006 (same). Patane correctly conceded that the district court's reasoning was erroneous in light of our precedent, and on appeal he argued only that the officers lacked probable cause to believe that he was a felon in possession of a gun. The district court did not reach this issue, and we decline to do so in the first instance on appeal.

As explained above, this questioning led Patane to admit that he possessed a gun in his bedroom, which admission in turn led immediately to seizure of the gun. The Government correctly concedes that Patane's admissions in response to questioning were inadmissible under *Miranda* but argues that the physical fruit of the *Miranda* violation—the gun—is admissible.

The district court determined that it was unnecessary to decide whether the physical fruits of a *Miranda* violation must be suppressed because it had concluded that the underlying arrest that led to the confession was unconstitutional. Because we have reversed the conclusion that the arrest was unconstitutional, we are now squarely presented with the issue whether the gun should be suppressed in any event because it was obtained as the fruits of an unconstitutionally obtained confession. This issue was fully briefed and presented below and it is again fully briefed on appeal. Resolution of this issue involves our answering a purely legal question (i.e., whether the physical fruits of a *Miranda* violation must be suppressed), a question that potentially would render remand and further proceedings unnecessary. Thus, we now turn to that issue. *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001). Below, we conclude that the physical evidence that was the fruit of the *Miranda* violation in this case must be suppressed.

A. Supreme Court precedent

The Government relies primarily on two Supreme Court cases for its argument that the fruits doctrine does not apply to *Miranda* violations: *Michigan v. Tucker*, 417 U.S. 433, 445-46, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974), and *Oregon v. Elstad*, 470 U.S. 298, 306, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985). Both cases, it is true, declined to apply the fruits of the poisonous tree

doctrine of *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), to suppress evidence obtained from an un-Mirandized confession. However, both cases were predicated upon the premise that the *Miranda* rule was a prophylactic rule, rather than a constitutional rule. *Elstad*, 470 U.S. at 305, 105 S. Ct. 1285 ("The prophylactic *Miranda* warnings are not themselves rights protected by the Constitution . . . .'" (quoting *New York v. Quarles*, 467 U.S. 649, 654, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984)) (internal quotation marks omitted)); *id.* at 308, 105 S. Ct. 1285 ("Since there was *no* actual *infringement* of the suspect's *constitutional rights*, [*Tucker*] was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed." (emphasis added)); *Tucker*, 417 U.S. at 445-46, 94 S. Ct. 2357 (distinguishing *Wong Sun* because "the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege"). Because *Wong Sun* requires suppression only of the fruits of *unconstitutional* conduct, the violation of a prophylactic rule did not require the same remedy.

However, the premise upon which *Tucker* and *Elstad* relied was fundamentally altered in *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). In *Dickerson*, the Supreme Court declared that *Miranda* articulated a constitutional rule rather than merely a prophylactic one. *Id.* at 444, 86 S. Ct. 1602 ("*Miranda* announced a constitutional rule that Congress may not supersede legislatively."); *see id.* at

432, 438, 440, 86 S. Ct. 1602. Thus, *Dickerson* undermined the logic underlying *Tucker* and *Elstad*.

Additionally, a close reading of *Tucker* and *Elstad* reveals other distinctions that lead us to conclude that those cases should not be given the sweeping reading the Government is asserting. We examine each decision below.

Tucker involved an un-*Mirandized* custodial interrogation that occurred prior to the issuance of the *Miranda* decision.[3] During the course of the interrogation, the defendant identified a relevant witness of whom the police previously had been ignorant. The defendant argued before the Court that the testimony of the witness so identified by the defendant should have been barred as the fruit of the *Miranda* violation. The Court's rejection of this argument rested largely on its conclusion that excluding the fruits of this confession would have minimal prophylactic effect because the officers were acting in complete good faith under prevailing pre-*Miranda* law that barred only coerced confessions. After noting in the opening paragraph of the opinion that the interrogation took place prior to *Miranda*, *Tucker*, 417 U.S. at 435, 94 S. Ct. 2357, the Court explained:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right . . . . Where the official action was pursued in complete

[3] *Miranda* nonetheless applied because it was issued prior to Tucker's trial. In fact, the defendant received all the warnings later incorporated into the Miranda requirements except for the advice that he could receive free counsel if he was indigent.

good faith, however, the deterrence rationale loses much of its force.

We consider it significant to our decision in this case that the officers' failure to advise respondent of his right to appointed counsel occurred prior to the decision in *Miranda*. *Although we have been urged to resolve the broad question of whether evidence derived from statements taken in violation of the Miranda rules must be excluded regardless of when the interrogation took place, we instead place our holding on a narrower ground.* For at the time respondent was questioned these police officers were guided, quite rightly, by the principles established in *Escobedo v. Illinois* . . . .

Id. at 447, 94 S. Ct. 2357 (emphasis added, footnote omitted). The Court then noted that no coercion rendered the challenged testimony unreliable. *Id.* at 449, 94 S. Ct. 2357.

The other Supreme Court case offered by the Government to support its argument is *Elstad*, 470 U.S. at 306, 105 S. Ct. 1285. In *Elstad*, the defendant made incriminating statements while in custodial interrogation prior to the issuance of *Miranda* warnings. The police then administered *Miranda* warnings, and thereafter the defendant made further incriminating statements. The issue in *Elstad* was whether the defendants post-*Mirandized* statements must be suppressed as the fruit of the earlier *Miranda* violation. *Id.* at 303, 105 S. Ct. 1285. The Supreme Court held that suppression was not required, rejecting the view that the post-warning statements were the unconstitutional product of "a subtle form of lingering compulsion, the psychological impact of the suspect's conviction that he has let the cat

out of the bag." *Id.* at 311, 105 S. Ct. 1285. After repeating the now-suspect reasoning that a *Miranda* violation was not necessarily a constitutional violation and thus not controlled by the fruits doctrine of *Wong Sun*, the Court stated:

> [T]he *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted . . . . .
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> . . . . In deciding how sweeping the judicially imposed consequences of a failure to administer *Miranda* warnings should be, the *Tucker* Court noted that neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression of the witness' testimony. The unwarned confession must, of course, be suppressed, but the Court ruled that introduction of the third-party witness' testimony did not violate Tucker's Fifth Amendment rights.

We believe that this reasoning applies with equal force when the alleged "fruit" of a noncoercive *Miranda* violation is neither a witness nor an article of evidence but the accused's own voluntary testimony. As in *Tucker*, the absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader rule. Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities. The Court has often noted: *A living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized.* The living witness is an in-

> dividual human personality whose attributes of will, perception, memory and *volition* interact to determine what testimony he will give.

Id. at 307-09, 105 S. Ct. 1285 (first emphasis added, alterations and internal quotation marks omitted). *Elstad* thus drew a distinction between fruits consisting of a subsequent confession by the defendant after having been fully Mirandized and fruits consisting of subsequently obtained "inanimate evidentiary objects." *Id.* at 309, 105 S. Ct. 1285. A subsequent, Mirandized confession need not be excluded because it is the product of "*volition*," willingly offered up by a defendant who already had been made aware of his *Miranda* rights. *Id.* By implication, "inanimate evidentiary objects" would be excludable, because physical evidence derived from the defendant's un-Mirandized statement is not the product of volition after a defendant has been Mirandized properly.[4] *See id.* at 347 n. 29, 105 S. Ct.

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[4] *See also Orozco* v. *Texas*, 394 U.S. 324, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969). In *Orozco*, the officers interrogated a suspect in custody without giving *Miranda* warnings, learning that the suspect owned a gun and where it was located. *Id.* at 325, 89 S. Ct. 1095. Ballistics tests of the gun indicated that it had been used to commit a murder. *Id.* In a terse holding, the Court held that "*the use* of these admissions obtained in the absence of the required warnings was a flat violation of the Self Incrimination Clause of the Fifth Amendment as construed in *Miranda*." *Id.* at 326, 89 S. Ct. 1095 (emphasis added). The Court did not expressly consider whether the gun and the ballistics evidence would be admissible on remand. However, one plausible reading of *Orozco* is that the reference to the unconstitutional "use" of the statements includes their use by police officers in obtaining the gun, as well as their introduction of the admission at trial.

This reading of *Orozco* is reinforced by the Court's subsequent opinion in *Kastigar* v. *United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). *Kastigar* noted that the privilege against

1285 (Brennan, J., dissenting) ("[T]oday's opinion surely ought not be read as also foreclosing application of the traditional derivative-evidence presumption to physical evidence obtained as a proximate result of a *Miranda* violation. The Court relies heavily on individual 'volition' as an insulating factor in successive-confession cases . . . . [This] factor is altogether missing in the context of inanimate evidence." (citation omitted)).[5]

While the reasoning regarding volition in *Elstad*'s holding indicates that the physical fruits of a *Miranda* violation are subject to the *Wong Sun* fruits doctrine, we acknowledge that dicta elsewhere in the opinion has been cited for the contrary conclusion. *See Elstad*, 470 U.S. at 307, 105 S. Ct. 1285 ("[T]he *Miranda* presumption, though irrebuttable for purposes of the prosecu-

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self-incrimination "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used," *id.* at 445, 92 S. Ct. 1653, and that "immunity from use and derivative use is coextensive with the scope of the privilege," *id.* at 453, 92 S. Ct. 1653. Indeed, in *Miranda* itself the Court stated that "unless and until such warnings and waiver are demonstrated by the prosecution at trial, *no evidence obtained as a result of interrogation* can be used against him." 384 U.S. 436, 454, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (emphasis added).

[5] There is a substantial argument that *Elstad* ought not even be treated as a case involving application of the *Wong Sun* fruits doctrine in the first place, for precisely the reasons emphasized by *Elstad* in its volition discussion. In rejecting the argument that the second confession was the result of some "subtle form of lingering compulsion," *id.* at 311, *Elstad* in effect concluded that the second confession was not evidence "obtained . . . as a direct result" of the *Miranda* violation. *Wong Sun*, 371 U.S. at 485, 83 S. Ct. 407. In other words, the post-Mirandized confession in *Elstad* was admitted *because* it *was not* (rather than *despite* the fact that it *was*) the fruit of the poisonous tree.

tion's case in chief, does not require that the statements and their fruits be discarded as inherently tainted."); *Id.* at 308, 105 S. Ct. 1285 (stating that *Tucker*'s reasoning "applies with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation is neither a witness nor an article of evidence but the accused's own voluntary testimony").[6] These passages, in contrast to the volition discussion, provide only ambiguous support for the position for which they are cited. To the extent they do address the admissibility of the physical fruits of a *Miranda* violation rather than a subsequent Mirandized confession, they are dicta not part of the reasoning of the holding.

In any event, we do not suggest that the holding in *Elstad* relying on volition definitively establishes that the physical fruits of a *Miranda* violation must be suppressed. Rather, the essential point for our analysis is only that *Elstad* does not definitively establish the contrary rule. We think Justice White most accurately summarized the relevance of *Elstad* and *Tucker* to the issue of suppression of the physical fruits of a *Miranda* violation:

> In *Michigan v. Tucker*, this Court expressly left open the question of the admissibility of physical evidence obtained as a result of an interrogation

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[6] We also recognize that Justice O'Connor argued that the physical fruits of a *Miranda* violation were not subject to *Wong Sun* suppression in her pre-*Elstad* concurrence in *New York* v. *Quarles*, 467 U.S. 649, 665-72, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part). As explained above, this argument was not adopted by the Court in *Elstad* or in any subsequent opinion of the Court. Justice O'Connor joined the majority opinion in *Dickerson*.

> conducted contrary to the rules set forth in *Miranda v. Arizona*. Since that time, the state and federal courts have been divided on this question. Indeed, in *Massachusetts v. White*, 439 U.S. 280, 99 S. Ct. 712, 58 L. Ed. 2d 519 (1978), this Court was evenly divided on the issue of the admissibility of physical evidence obtained from an interrogation that violated *Miranda*.
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> . . . .
>
> While *Elstad* has been considered illuminating by some Courts of Appeals on the question of admissibility of physical evidence yielded from a *Miranda* violation, that decision did not squarely address the question presented here, and in fact, left the matter open.

Patterson v. United States, 485 U.S. 922, 922-23, 108 S. Ct. 1093, 99 L. Ed. 2d 255 (1988) (White, J., dissenting from denial of certiorari) (footnotes and citations omitted).

It is true that, prior to *Dickerson*, the Tenth Circuit applied *Tucker* and *Elstad* to the physical fruits of a *Miranda* violation and concluded that suppression was not required because "[w]here the uncounseled statement is voluntary . . . there is no fifth amendment violation and the fruits may be admissible." *United States v. McCurdy*, 40 F.3d 1111, 1117 (10th Cir. 1994) (internal quotations omitted). However, once again *Dickerson* has undercut the premise upon which that application of *Elstad* and *Tucker* was based because *Dickerson* now concludes that an un-Mirandized statement, even if voluntary, is a Fifth Amendment violation. *Dickerson*, 530 U.S. at 444, 120 S. Ct. 2326.

Accordingly, we reject the Government's position that *Tucker* and *Elstad* foreclose suppression of the physical fruits of a *Miranda* violation.

B. Lower court approaches

Courts applying *Dickerson* have split on the proper application of *Wong Sun* to the physical fruits of a *Miranda* violation. The Third and Fourth Circuits have ruled that the physical fruits of a *Miranda* violation never are subject to *Wong Sun* suppression. *United States v. Sterling*, 283 F.3d 216, 218-19 (4th Cir. 2002), cert. denied, — U.S. —, 122 S. Ct. 2606, 153 L. Ed. 2d 792 (2002); *United States v. DeSumma*, 272 F.3d 176, 180-81 (3d Cir. 2001), cert. denied, — U.S. — , 122 S. Ct. 1631, 152 L. Ed. 2d 641 (2002); *United States v. Newton*, 181 F. Supp. 2d 157, 179-81 & n.16 (E.D.N.Y. 2002); *accord Taylor v. State*; 274 Ga. 269, 553 S.E.2d 598, 605 (2001) *State v. Walton*, 41 S.W.3d 75, 88-90 (Tenn. 2001); *cf. Abraham v. Kansas*, 211 F. Supp. 2d 1308, 1323 (D. Kan. July 2002) (holding that "[a]lthough the Court's holding in *Dickerson* seems to have altered this general rule [that fruits of a *Miranda* violation need not be suppressed]," the state court's failure to suppress physical fruits was not an "unreasonable application of federal law" under 28 U.S.C. § 2254(d)(1)); *Worden v. McLemore*, 200 F. Supp. 2d 746, 752-53 (E.D. Mich. 2002) (holding that state court's failure to suppress physical fruits of *Miranda* violation was not an unreasonable application of clearly established federal law because of "disagreement and confusion" among courts regarding application of *Dickerson*). The First Circuit, by contrast, has ruled that the physical fruits of a *Miranda* violation must be suppressed in certain circumstances, depending on the need for deterrence of police misconduct in light of the circumstances of each

case. *United States v. Faulkingham*, 295 F.3d 85, 90-94 (1st Cir. 2002). Below, we analyze the merits of each of these approaches. We conclude that the First Circuit is correct that the physical fruits of a violation must be suppressed where necessary to serve *Miranda*'s deterrent purpose. However, we part company with the First Circuit in the application of that standard, because we conclude that *Miranda*'s deterrent purpose requires suppression of the physical fruits of a negligent *Miranda* violation. We therefore conclude that suppression of the gun in the present case was appropriate.

1. Sterling & DeSumma

The Third and Fourth Circuits have concluded that the fruits doctrine simply does not apply to *Miranda* violations even after *Dickerson*. *United States v. Sterling*, 283 F.3d 216, 218-19 (4th Cir. 2002) cert. denied, *United States v. DeSumma*, 272 F.3d 176, 180-81 (3d Cir. 2001), cert. denied, — U.S. — , 122 S. Ct. 1631, 152 L. Ed. 2d 641 (2002). Both of these cases held that the physical fruits of a *Miranda* violation were admissible. *Sterling*, 283 F.3d at 219 (shotgun found in vehicle as a result of *Miranda* violation); *DeSumma*, 272 F.3d at 180-81 (gun found in vehicle as a direct result of *Miranda* violation). Both *Sterling* and *DeSumma* relied on substantially the same reasoning, focusing primarily on an isolated passage in *Dickerson*. *Dickerson* noted at the outset of the opinion that "*Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts." 530 U.S. at 432, 120 S. Ct. 2326. Later in the opinion, in the course of rejecting various arguments supporting the erroneous view that

Miranda was not a constitutional decision, the Court stated:

> The Court of Appeals also noted that in *Oregon v. Elstad* we stated that "[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself." Our decision in that case—refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases—does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are *different* from unwarned interrogation under the Fifth Amendment.

Dickerson, 530 U.S. at 441, 120 S. Ct. 2326 (emphasis added, citations and internal quotations omitted).

Both *Sterling* and *DeSumma* viewed this language as amounting to an endorsement of the rule that the *Wong Sun* exclusionary rule does not apply to the physical fruits of a *Miranda* violation. *Sterling*, 283 F.3d at 219; *Desumma*, 272 F.3d at 180. *Sterling* explained:

> Although *Dickerson* held *Miranda* to be with Constitutional significance, *Miranda* only held that certain warnings must be given before a suspect's *statements* made during custodial interrogation can be admitted into evidence. In addition, we are of opinion that the Court's reference to and reaffirmation of *Miranda*'s progeny indicates that the established exceptions, like those in *Tucker* and *Elstad*, survive. Thus, the distinction between statements and derivative evidence survives *Dickerson*. In fact, *Dickerson* reiterated the distinction made in *Elstad* by stating that: "Our decision in that case—refusing to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases—does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment."

283 F.3d at 219 (emphasis in original, citation omitted).

There are at least two serious problems with the reasoning in *DeSumma* and *Sterling*. First, we respectfully disagree with their conclusion that *Dickerson*'s reference to the controlling force of "*Miranda* and its progeny in this Court" forecloses the argument that the physical fruits of a *Miranda* violation may be suppressed. Although we agree that, based on this language, the holdings of *Elstad* and *Tucker* survive *Dickerson*, neither *Elstad* nor *Tucker* involved the physical fruits of a *Miranda* violation; as explained above, *Elstad* expressly contrasted the subsequent confession it found admissible from physical fruits, while *Tucker* expressly limited its holding to pre-*Miranda* interrogations. *See Patterson*, 485 U.S. at 922-24, 108 S. Ct. 1093 (White, J., dissenting from denial of certiorari). By wholly undermining the doctrinal foundation upon which those holdings were built, *Dickerson* effectively left *Elstad* and *Tucker* standing but prevented lower courts from extending their holdings. Of course, prior to *Dickerson* many *lower* courts (including this one) already had expanded the holdings of *Elstad* and *Tucker* by concluding that *Miranda* violations do not require suppression of physical fruits, but *Dickerson* explicitly limited its saving language to *Miranda*'s "progeny in *this* Court." 530 U.S. at 432, 120 S. Ct. 2326 (emphasis added). Far from endorsing pre-*Dickerson* lower court

case law, then, *Dickerson* instead signaled the contrary view.

The second fundamental problem with the reasoning in *DeSumma* and *Sterling* is that the language that they rely on for the proposition that *Dickerson* endorsed the extension of *Elstad* to physical fruits in fact said only that *Elstad* "recognizes . . . that unreasonable searches under the Fourth Amendment are *different* from unwarned interrogation under the Fifth Amendment." 530 U.S. at 441, 120 S. Ct. 2326 (emphasis added). The critical question, of course, is *how* the two are different. At oral argument in the present case, the Government argued only that the way that Fourth Amendment violations differ from Fifth Amendment violations is that the *Wong Sun* fruits doctrine applies to the former and not the latter. This argument already has been rejected by the Supreme Court. *Nix v. Williams*, 467 U.S. 431, 442 & n.3, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984) (noting that the Court has applied the fruits doctrine to violations of the Fifth Amendment, citing *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964)); *Kastigar v. United States*, 406 U.S. 441, 460-61, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). Although *Dickerson* itself does not explain how searches under the Fourth Amendment are "different," *Elstad* does just that: "a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a *broad* application of the 'fruits' doctrine." 470 U.S. at 306, 105 S. Ct. 1285 (emphasis added).[7] This language indicates that *Miranda* violations are "different" because a *narrowed* application of the fruits doctrine applies to *Miranda* violations, not because the fruits doctrine does not apply at all. *Cf. id.* at 306, 105 S. Ct. 1285 (referring to "[t]he *Miranda* exclusionary rule").

[7] *Elstad* also stated that a second way that Fourth Amendment violations are different from *Miranda* violations is that only the former are constitutional violations. 470 U.S. at 305-07, 105 S. Ct. 1285. This difference, of course, is one that *Dickerson* itself rejects.

Of course, *Elstad*'s explanation of how application of the fruits doctrine is "different" in *Miranda* cases begs the question of what a "broad" application means. We conclude that the broad application of the fruits doctrine is that defined in *Nix*: "the prosecution is not to be put in a better position than it would have been in if no illegality had transpired." 467 U.S. at 443, 104 S. Ct. 2501. Application of the fruits doctrine in the *Miranda* context is not "broad" because a number of exceptions to this pure rule have been recognized, circumstances where the prosecution is permitted to benefit from the *Miranda* violation. *See Elstad*, 470 U.S. at 314, 105 S. Ct. 1285; *Tucker*, 417 U.S. at 447-48, 94 S. Ct. 2357; *New York v. Quarles*, 467 U.S. 649, 657, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984) (unwarned answers "to questions in a situation posing a threat to the public safety" may be used); *Harris v. New York*, 401 U.S. 222, 225-26 & n.2, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) (unwarned statements may be used for impeachment on cross-examination).

One could argue that further narrowing of the pure fruits doctrine in the context—narrowing beyond that already effectuated by the holdings of *Elstad* and *Tucker*[8]—also is appropriate. However, we are unper-

[8] *Tucker*'s narrowing would seem no longer applicable because it appeared to establish an exception only for questioning that predated *Miranda* itself. *Elstad*'s narrowing would still have applica-

suaded that the additional narrowing articulated in *DeSumma* and *Sterling* (refusing to apply the fruits exclusion to physical evidence obtained as a result of the illegally obtained confession) reflects a correct understanding of the way in which *Miranda* violations are, in *Dickerson*'s words, "different" from Fourth Amendment violations.

A blanket rule barring application of the fruits doctrine to the physical fruits of a *Miranda* violation would mark a dramatic departure from Supreme Court precedent. The Court consistently has recognized that deterrence of police misconduct, whether deliberate or negligent, is the fundamental justification for the fruits doctrine. *Nix*, 467 U.S. at 442-43, 104 S. Ct. 2501 ("The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections."); *see also Elstad*, 470 U.S. at 308, 105 S. Ct. 1285 (identifying trustworthiness and deterrence as the two rationales for a broad fruits suppression rule); 417 U.S. at 447, 94 S. Ct. 2357 (noting "the deterrent purpose of the exclusionary rule"). The Court also has been consistent in narrowing the scope of the fruits doctrine in the context only where deterrence is not meaningfully implicated. *See Elstad*, 470 U.S. at 308-09, 105 S. Ct. 1285 (stating that admission of voluntary post-warning statements will not undercut deterrence because the suspect remains "free to exercise his own volition in deciding whether or not to make a [post-

---

bility today because it declined to apply the fruits exclusion to a subsequent voluntary confession rendered after the warnings are given.

warning] statement to the authorities"); *Tucker*, 417 U.S. at 447-48, 94 S. Ct. 2357 (explaining that the "deterrence rationale loses much of its force" in that case because the unwarned interrogation occurred prior to *Miranda*'s issuance).

In sharp contrast with *Elstad* and *Tucker*, however, the rule argued for by the Government here risks the evisceration of the deterrence provided by the fruits doctrine, as this case well illustrates. As a practical matter, the inability to offer Patane's statements in this case affords no deterrence, because the ability to offer the physical evidence (the gun) renders the statements superfluous to conviction. *See generally United States v. Kruger*, 151 F. Supp. 2d 86, 101-02 (D. Me. 2001) ("The exclusion of the cocaine, the substance—indeed essence—of the suppressed statements, is necessary to deter law enforcement officers from foregoing the administration of *Miranda* warnings . . . . "), *overruled by Faulkingham*, 295 F.3d at 92-94; Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 *Mich. L. Rev.* 929, 933 (1995) ("Unless the courts bar the use of the often-valuable evidence derived from an inadmissible confession, as well as the confession itself, there will remain a strong incentive to resort to forbidden interrogation methods."); David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 *Ohio St. L. J.* 805, 843-48 (1992) ("Police officers seeking physical evidence are not likely to view the loss of an unwarned confession as particularly great when weighed against the opportunity to recover highly probative nontestimonial evidence, such as a murder weapon or narcotics."). The present case is hardly anomalous in this respect, as demonstrated by the multitude of reported

cases where the record demonstrated that the interrogating authorities intentionally (and in some cases pursuant to official policy and training) violated a suspect's *Miranda* rights in order to procure derivative evidence. *E.g.*, *United States v. Orso*, 234 F.3d 436, 441 (9th Cir. 2000) *aff'd in part, rev'd in part*, 266 F.3d 1030 (9th Cir. 2001) (en banc); *Henry v. Kernan*, 197 F.3d 1021, 1026, 1028 (9th Cir. 1999); *Pope v. Zenon*, 69 F.3d 1018, 1023-24 (9th Cir. 1995), *overruled by Orso*, 266 F.3d 1030; *Cooper v. Dupnik*, 963 F.2d 1220, 1224-27 (9th Cir. 1992); *United States v. Carter*, 884 F.2d 368, 373 (8th Cir. 1989); *United States v. Esquilin*, 42 F. Supp. 2d 20, 33 (D. Me. 1999), *aff'd*, 208 F.3d 315 (1st Cir. 2000).

Further, the rule urged upon us by the Government appears to make little sense as a matter of policy. From a practical perspective, we see little difference between the confessional statement "The Glock is in my bedroom on a shelf," which even the Government concedes is clearly excluded under *Miranda* and *Wong Sun*, and the Government's introduction of the Glock found in the defendant's bedroom on the shelf as a result of his unconstitutionally obtained confession. If anything, to adopt the Government's rule would allow it to make *greater* use of the confession than merely introducing the words themselves.

Accordingly, we decline to adopt the position of the Third and Fourth Circuits that the *Wong Sun* fruits doctrine never applies to *Miranda* violations.

2. Faulkingham

With its recent decision in *United States v. Faulkingham*, 295 F.3d 85 (1st Cir. 2002), the First Circuit rejected the Third and Fourth Circuits' blanket refusal to apply *Wong Sun* suppression to the fruits of a

Miranda violation. *Id.* at 90-91. *Faulkingham* acknowledged, contrary to *Sterling* and *DeSumma*, that *Dickerson*'s recognition that *Miranda* violations are constitutional violations strengthened the argument that their physical fruits must be suppressed. *Id.* at 92-93. However, *Faulkingham* concluded that suppression of the fruits of a *Miranda* violation was not required in every case. Rather, it adopted a rule mandating suppression of the fruits of a *Miranda* violation in individual cases where "a strong need for deterrence" outweighs the reliability of that evidence. *Id.* at 93. Because the physical fruits of a *Miranda* violation generally will be trustworthy evidence, it appears that in most cases the First Circuit's analysis boils down to a rule excluding the fruits of a *Miranda* violation only when there is a "strong need for deterrence." On each of *Faulkingham*'s two basic points—that *Dickerson* alters the analysis regarding suppression of the fruits of a *Miranda* violation, and that suppression of the physical fruits is required where necessary to effectuate *Miranda*'s deterrent purpose—we agree with the First Circuit. For reasons already stated above, we conclude that each of these propositions is compelled by Supreme Court precedent.

Turning to the application of this standard to circumstances—present both in *Faulkingham* and in the present case—where an officer negligently rather than intentionally violates a defendant's *Miranda* rights, however, we disagree with the First Circuit. In *Faulkingham*, the court concluded that, where the *Miranda* violation resulted from mere negligence on the part of the interrogating officer, there is no strong need for deterrence and thus the physical fruits of the violation need not be excluded. We conclude that

Faulkingham's cramped view of deterrence leads it to an erroneous conclusion regarding negligent *Miranda* violations.

Faulkingham asserted, without elaboration, that "[o]nce the un-*Mirandized* inculpatory statements of the defendant are themselves suppressed, the role of deterrence under the Fifth Amendment becomes less primary." *Id.* at 92. The heart of the court's analysis is the following:

> Where, as here, negligence is the reason that the police failed to give a warning, the role of deterrence is weaker than in a case . . . where the apparent reason the police failed to give a warning was their intention to manipulate the defendant into giving them information.
>
> Faulkingham's claim, taking all the surrounding circumstances into account, simply does not tip the balance toward a strong need for deterrence. Faulkingham's statement was not the result of "coercive official tactics." There was no deliberate misconduct by the [police] agents here. There was no misleading or manipulation by the government . . . . The findings of the magistrate judge and the trial judge give us no reason to think that the agents deliberately failed to give the warning in order to get to the physical evidence or that they did so to get to another witness who might or might not incriminate Faulkingham. The agents' negligence resulted in the suppression of Faulkingham's confession, itself a detriment to the agents . . . .

Id. at 93-94 (citation to opinion below omitted). The court noted that "Faulkingham himself started talking without much questioning" and observed that "there is

nothing to shock the conscience of the court and no fundamental unfairness." *Id.* at 94. In light of the totality of the circumstances, the court held "that Faulkingham's far weaker argument for recognition of a deterrence interest for suppression of derivative evidence arising from a negligent violation of his *Miranda* rights is insufficient to carry the day." *Id.*

We do not believe that "the role of deterrence . . . becomes less primary" once the statement itself has been suppressed. *Id.* at 92. Instead, the relevant question remains whether suppression of the statement alone provides deterrence sufficient to protect citizens' constitutional privilege against self-incrimination. As we already have stated above, *see supra* at 1026-27, we answer this question in the negative.

Nor do we share *Faulkingham*'s view that there is a strong need for deterrence only where the officer's actions were deliberate rather than negligent. Finally, *Miranda* itself made clear that the privilege against self-incrimination was animated, not by a desire merely to deter intentional misconduct by police, but by the "one overriding thought" that "the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens." *Miranda*, 384 U.S. at 460, 86 S. Ct. 1602; *see also id.* ("[T]he privilege has come rightfully to be recognized in part as an individual's substantive right . . . to a private enclave where he may lead a private life." (internal quotation marks omitted)). The personal right to be free of government invasions of the privilege against self-incrimination is violated just as surely by a negligent failure to administer *Miranda* warnings as a deliberate failure. Deterrence is necessary not merely to deter intentional wrongdoing, but also to ensure that

officers diligently (non-negligently) protect—and properly are trained to protect—the constitutional rights of citizens. The call for deterrence may be somewhat less urgent where negligence rather than intentional wrongdoing is at issue, but in either case we conclude that the need is a strong one.

Moreover, we conclude that a rule limiting *Wong Sun* suppression of the physical fruits of a *Miranda* violation to situations where the police demonstrably acted in intentional bad faith would fail to vindicate the exclusionary rule's deterrent purpose. Even in cases where the failure to administer warnings was calculated, obtaining evidence of such deliberate violations of *Miranda* often would be difficult or impossible. *Cf. Whren v. United States*, 517 U.S. 806, 814, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996) (noting that one reason for the Court's adoption of an objective test for the reasonableness of a seizure was "the evidentiary difficulty of establishing subjective intent" of officers). An exclusionary rule turning on the subjective motivation of the police officer would burden courts with the difficult task of discerning, from the particular facts of each case, the thought processes of the officer that resulted in the *Miranda* violation. *See Carter*, 884 F.2d at 374 (reasoning that courts should not "once again be embroiled in the endless case-by-case voluntariness inquiries *Miranda* was designed to prevent [because] the ease-of-application rationale enunciated by the Supreme Court will be largely nullified"). We believe a rule that provides certainty in application and clarity for the officers charged with operating under it better serves the interests of citizens, officers, and judicial efficiency.

Accordingly, we agree with the First Circuit's conclusion that the *Wong Sun* fruits doctrine may apply to

the physical fruits of *Miranda* violations, but we decline to adopt *Faulkingham*'s view that the physical fruits of a negligent *Miranda* violation are admissible. As a practical matter, we agree with the view of the United States District Court for the District of Maine, expressed in an opinion issued prior to *Faulkingham*:

> Prior to the decision in *Dickerson*, the issue of suppression of evidence discovered as a result of a violation of *Miranda* turned on a complex and largely opaque analysis attempting to resolve on an ad hoc basis the tension between the reliability of the subject evidence and the goal of deterrence of police misconduct. This Court believes all of that has gone by the board with the conferral by *Dickerson* of constitutional status on the right to a Miranda warning.

United States v. Kruger, 151 F. Supp. 2d 86, 101-02 (D. Me. 2001) (citations omitted), *overuled by Faulkingham*, 295 F.3d at 90-94.

As explained above, we conclude that *Miranda*'s deterrent purpose would not be vindicated meaningfully by suppression only of Patane's statement. We hold that the physical fruits of this violation must be suppressed.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's order suppressing the gun.[9]

---

[9] Defendant Appellee's Motion to Clarify Statements Made in Defendant Appellee's Previously Filed Answer Brief is denied as moot.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-1503

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

SAMUEL FRANCIS PATANE, DEFENDANT-APPELLEE

Filed Dec. 9, 2002

ORDER

Before: EBEL, ANDERSON, and HENRY, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

/s/ by: AUDREY F. WEIGEL
Deputy Clerk

Supreme Court, U.S.
FILED
MAR 14 2003
CLERK

(3)

NO. 02-1183

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

UNITED STATES OF AMERICA, *Petitioner*,

v.

SAMUEL FRANCIS PATANE, *Respondent*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent Samuel Patane, by and through his court appointed counsel, Jill M. Wichlens, Assistant Federal Public Defender for the Districts of Colorado and Wyoming, respectfully requests this Honorable Court for leave to proceed *in forma pauperis* in filing the attached Brief for Respondent in Opposition. In support of this request, respondent states that undersigned counsel was appointed pursuant to the

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Criminal Justice Act of 1964, 18 U.S.C. § 3006A, by the United States Court of Appeals for the Tenth Circuit, and he is unable to retain counsel and pay for the costs attendant to the proceedings before this Honorable Court.

WHEREFORE, respondent Samuel Patane, respectfully requests that he be granted leave to proceed *in forma pauperis*.

Respectfully submitted,

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Does the fruit of the poisonous tree doctrine apply to physical-evidence fruit of a Miranda violation?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

UNITED STATES OF AMERICA, *Petitioner*,

v.

SAMUEL FRANCIS PATANE, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT

Following a suppression hearing in the United States District Court for the District of Colorado, the district court ordered the suppression of a gun the United States intended to use in prosecuting respondent Samuel Patane under 18 U.S.C. § 922(g), which prohibits felons from possessing firearms. (ROA: 10-13-01 TS at 2-11). Following an interlocutory appeal taken by the United States, the court of appeals affirmed. United States v. Patane, 304 F.3d 1013 (10th Cir. 2002). Rehearing en banc was denied. (Pet. at App. B).

1. On June 3, 2001, a state court issued a temporary restraining order against Mr. Patane. (ROA: Supp. Exh. B). The order prohibited Mr. Patane from making direct or indirect contact with his ex-girlfriend, Linda O'Donnell, for three days. (ROA: 9/27/01 TS at 5). The day after the order was issued, June 4, 2001, Ms. O'Donnell answered her telephone, only to have the caller hang up. (ROA: Supp. Exh. A). Ms. O'Donnell's subsequent activation of the "*69" feature on her telephone showed that the call had come from Mr. Patane's home telephone number. (Id.). Ms. O'Donnell did not report the hang-up call to the police.

Two days later, on June 6, 2001, the day the restraining order was to expire, Mr. Patane's probation officer called the Bureau of Alcohol, Tobacco, and Firearms (ATF) to report that Mr. Patane, a convicted felon, was in possession of a .40 caliber Glock pistol. (ROA: 9/27/01 TS at 30-31). The probation officer reported further that Mr. Patane was under a temporary restraining order involving his ex-girlfriend, Linda O'Donnell. (Id.).

After the probation officer's call to ATF, local police officer Tracy Fox was sent to contact Ms. O'Donnell to see whether any violations of the soon-to-expire restraining order had occurred. (Id. at 4, 32). Ms. O'Donnell told Officer Fox that the only contact that had occurred was the single hang-up phone call two days earlier. (ROA: Supp. Exh. A). Ms. O'Donnell also said that Mr. Patane had a gun and that she was afraid he would kill her. (ROA: Supp. Exh. B).

Detective Josh Benner, a local officer assigned to work with ATF, also contacted Ms. O'Donnell, to question her about Mr. Patane's possession of the gun. (ROA: 9/27/01 TS at 29-32). Ms. O'Donnell told Detective Benner that she had been with Mr. Patane at a gun show a month before, that he had purchased a Glock, and that she had given him suggestions on where to go to practice shooting the gun. (ROA: 9/27/01 TS at 31-32; Supp. Exh. C).

After talking to Ms. O'Donnell, Detective Benner and Officer Fox went to Mr. Patane's house to arrest him for violating the restraining order. (ROA: Supp. Exh. B, C). Another officer, Officer Mulso, came along to assist in the arrest. (ROA: 9/27/01 TS at 7). When they got to Mr. Patane's house, Officers Fox and Mulso went to the front door while Detective Benner went around to guard the back door in case Mr. Patane tried to run. (Id. at 7-8). When Mr. Patane came to the door in response to the officers' knock, the officers asked him to step outside. (Id.) When Mr. Patane complied, Officer Fox said she was there in regard to a restraining order violation Ms. O'Donnell had reported. (Id. at 23-24). Mr. Patane denied making any attempt to contact Ms. O'Donnell in violation of the restraining order. (ROA: Supp. Exh. B). Officer Fox nonetheless arrested him for violating the restraining order. (ROA: 9/27/01 TS at 8).

After informing Mr. Patane that he was under arrest, Officer Fox asked him if he had any identification and if he would like to get his shoes. (Id. at 8, 15). Mr. Patane turned to go back into the house, and the officers followed him inside. (Id. at 9, 15-16). When the officers followed Mr. Patane into his bedroom, he became very upset and started to cry. (Id. at 9, 24). At this point, the officers handcuffed Mr. Patane and took him back outside. (Id.)

Detective Benner came back around to the front of the house. (Id. at 9, 34). Mr. Patane was still very upset. (Id. at 41-42). Detective Benner started reading Mr. Patane his Miranda rights, informing him that he had the right to remain silent. (Id. at 34-35). Mr. Patane cut the detective off at that point, telling him he knew his rights. (Id.) Without ascertaining whether Mr. Patane wished to waive his rights, and without informing him that his rights included the right to have an attorney present during questioning, to have an attorney appointed to represent him if he could not afford one, and the right to have questioning cease at any time, Detective Benner proceeded to question Mr. Patane about the Glock pistol. (Id.).

Detective Benner began by saying he was with the ATF gun interdiction unit and wanted to talk to Mr. Patane about the guns he owned. (Id. at 34-35). Mr. Patane said his .357 was already in police custody. (Id.). Detective Benner said he was more interested in the Glock. (Id.). Mr. Patane said he was not sure he should tell him about the Glock because he did not want the detective to take the gun away. (Id.).

Detective Benner said he needed to know about the Glock and that if Mr. Patane wanted "to get in front of the domestic violence case, he needed to be truthful regarding the location of his firearm." (Id. at 35, 43). (Id.). Mr. Patane then told the detective that the Glock was in the house, on a shelf in his bedroom. (Id.). Detective Benner asked if he could go get the gun. (Id. at 36). According to the detective, Mr. Patane said he could.[1] (Id.).

Detective Benner entered the house, found the gun where Mr. Patane said it would be, and seized it. (Id.). When Detective Benner got back outside, he asked Mr. Patane, in the presence of Officer Fox, where Mr. Patane had gotten the gun. (ROA: 9/27/01 TS at 36; Supp. Exh. B). According to Officer Fox, Mr. Patane said that Linda O'Donnell had purchased the gun at a gun show a month before. (ROA: Supp. Exh. B). According to Detective Benner, Mr. Patane said that it was he who had obtained the gun from the gun show. (ROA: 9/27/01 TS at 36; Supp. Exh. C). Mr. Patane was then taken to jail and booked on the charge of violating a restraining order. (ROA: 9/27/01 TS at 10). A violation of a restraining order is a misdemeanor under Colorado law. See C.R.S. 18-6-803.5.

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[1] Mr. Patane disputed Detective Benner's contention that he consented to an entry of his home and to seizure of the gun. (ROA: doc. 12). The district court made no finding on this question.

2. Mr. Patane was subsequently charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). (ROA: doc. 6). After he was indicted, he moved to suppress both the statements made in response to Detective Benner's questioning and the gun the detective seized as a result of the questioning. (ROA: doc. 12). Mr. Patane asserted that he was arrested without probable cause, that Detective Benner did not comply with the requirements of Miranda v. Arizona, 384 U.S. 436 (1966), and that his statements were involuntary. (Id.). The United States conceded in response to the motion that the statements were obtained in violation of Miranda. (ROA: 10/3/01 TS at 11). The government maintained that the gun was properly seized, however, and should not be suppressed. (Id. at 2-11).

The district court held a hearing on the motion. (ROA: 9/27/01 TS). After hearing evidence, the district court granted the suppression motion both as to the statements and as to the gun. (ROA: 10/3/01 TS). In granting the motion, the district court held that Mr. Patane's arrest was unlawful because the police lacked probable cause to believe that a violation of the restraining order had occurred. The court reasoned that a single hang-up call, which could be inadvertent, does not establish probable cause to believe a violation of a restraining order has occurred. The court reasoned further that both the gun and Mr. Patane's statements, which statements were independently suppressible due to the Miranda violation, were fruits of the illegal arrest, and that suppression was thus required. (ROA: 10/3/01 TS at 2-11).

The court specifically declined the government's request that it rule on the question of whether Mr. Patane's statements were voluntary. (Id. at 11).

3. The United States took an interlocutory appeal, challenging only the suppression of the gun. The United States argued that the district court erred in suppressing the gun because: 1) Mr. Patane's arrest was lawful because the police had probable cause to arrest him for violating the restraining order; 2) the arrest was lawful because the police also had probable cause to arrest Mr. Patane for being a felon in possession of a firearm; and 3) the gun was not suppressible as a fruit of the Miranda violation because the fruit of the poisonous tree doctrine does not apply to physical-evidence fruit of a Miranda violation. (Opening Brief of the United States).

Mr. Patane argued in response that the district court correctly suppressed the gun because: 1) the police lacked probable cause to arrest Mr. Patane for violating the restraining order; 2) the police lacked probable cause to arrest Mr. Patane for being a felon in possession of a firearm; 3) if probable cause existed, the warrantless arrest of Mr. Patane for a misdemeanor committed two days earlier violated the Fourth Amendment because the Fourth Amendment prohibits warrantless arrests for misdemeanors unless the misdemeanor was committed in the presence of the arresting officer; and 4) if the arrest was proper, the gun was nonetheless properly suppressed because it was the physical-evidence fruit of a Miranda violation. (Answer Brief of Samuel Patane).

The court of appeals affirmed. The court held that, while it disagreed with the district court's conclusion that there was no probable cause to arrest Mr. Patane for violating the restraining order, the gun was nonetheless properly suppressed because it was the physical-evidence fruit of a Miranda violation. The court of appeals did not reach either the United States' argument that probable cause existed to arrest Mr. Patane for being a felon in possession of a firearm or Mr. Patane's argument that the Fourth Amendment prohibits warrantless arrests for misdemeanors not committed in the presence of the arresting officer. United States v. Patane, 304 F.3d 1013 (10th Cir. 2002).

The United States' subsequent petition for rehearing en banc was denied. (Pet. at App. B).

ARGUMENT

Petitioner argues that the court of appeals erred in determining that the fruit of the poisonous tree doctrine applies to the physical-evidence fruit of a Miranda violation. (Pet. at 5-10). The court of appeals' holding, however, is dictated by this Court's decisions in Wong Sun v. United States, 371 U.S. 471 (1963), and Dickerson v. United States, 530 U.S. 428 (2000), and further review is therefore unwarranted.

1. In Wong Sun v. United States, 371 U.S. 471 (1963), this Court established that evidence derived from a constitutional violation must be suppressed unless "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" 371 U.S. at 487 (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)). The inquiry, described in Wong Sun as the "fruit of the poisonous tree" doctrine, is "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Wong Sun, 371 U.S. at 488 (quoting Maguire, Evidence of Guilt, 221 (1959)).

In Dickerson v. United States, 530 U.S. 428 (2000), this Court made clear that a failure to comply with the requirements of Miranda v. Arizona, 384 U.S. 436 (1966), is a constitutional violation. Dickerson, 530 U.S. at 444 ("In sum, we conclude that Miranda announced a constitutional rule. . ."). Consequently, the fruit of the poisonous tree doctrine applies to the fruit of a Miranda violation, at least where that fruit is physical evidence, just as the doctrine applies to the fruit of any other constitutional violation.

2. Notwithstanding this Court's decisions in Wong Sun and Dickerson, petitioner argues that the court of appeals' holding that the fruit of the poisonous tree doctrine applies to the physical-evidence fruit of a Miranda violation conflicts with

this Court's precedents. (Pet. at 5-10). Specifically, petitioner argues the court of appeals' holding conflicts with this Court's decisions in Michigan v. Tucker, 417 U.S. 433 (1974), and Oregon v. Elstad, 470 U.S. 298 (1985). (Pet. at 5-10). Petitioner is incorrect. The court of appeals' resolution of whether the fruit of the poisonous tree doctrine applies to physical-evidence fruit of a Miranda violation is not inconsistent with either Michigan v. Tucker or Oregon v. Elstad because neither case decided the question.

a. In Michigan v. Tucker, 417 U.S. 433 (1974), the defendant was subjected to custodial interrogation without being fully advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). This was not surprising given that, at the time the defendant was questioned, Miranda had not yet been decided. The statements the defendant made led the police, not to some piece of physical evidence, but to a live witness. By the time of trial, Miranda had been decided, and the defendant moved to suppress both his statements and the testimony of the witness the government had discovered as the result of his statements. The trial court granted the motion as to the defendant's statements but not as to the testimony of the live witness. The court of appeals affirmed.

After this Court granted certiorari, both parties asked this Court to resolve the broad question of whether the fruit of the poisonous tree doctrine applies to all fruits of a Miranda violation, regardless of the nature of that fruit. The parties asked this

Court, in addition, to resolve this broad question without regard to the fact that the "Miranda violation" in question took place before Miranda had been decided.

This Court declined both requests. In affirming the lower court's decision that the testimony of the live witness should not be suppressed, this Court rested its holding on a "narrower ground" than that requested by the parties. Id. at 447. This Court rested its holding on the narrower ground that the fruit of the poisonous tree doctrine does not apply to live-witness fruit of a pre-Miranda Miranda violation. This Court reasoned that the fruit of the poisonous tree doctrine does not apply in such a case because the evidence the prosecution sought to introduce was the "testimony of a third party who was subjected to no custodial pressures" and who was "available at trial and subject to cross-examination by respondent's counsel," id. at 449, and because "the officers' failure to advise respondent of his right to appointed counsel occurred prior to the decision in Miranda." Id. at 447.

This Court did not decide whether the fruit of the poisonous tree doctrine applies to physical-evidence fruit of a post-Miranda Miranda violation. See Patterson v. United States, 485 U.S. 922, 922-23 (1988) (White, J., dissenting from denial of certiorari) ("In Michigan v. Tucker, 417 U.S. 433, 447 (1974), this Court expressly left open the question of the admissibility of *physical* evidence obtained as a result of an interrogation conducted contrary to the rules set forth in Miranda v. Arizona, 384 U.S. 436 (1966)) (emphasis added).

b. In Oregon v. Elstad, 470 U.S. 298 (1985), the defendant was arrested at his home and subjected to custodial interrogation without being advised of his rights under Miranda. The defendant was then transported to the sheriff's office where he was questioned again, an hour after the first questioning. Before the second questioning began, the defendant was properly advised of his Miranda rights, and waived them. The defendant moved to suppress both his unwarned and his warned statements. The trial court granted the motion as to the unwarned statements, but denied it as to the warned statements. The court of appeals reversed the trial court's failure to suppress the warned statements, holding that the warned statements should have been suppressed as the fruit of the earlier Miranda violation.

This Court granted certiorari and reversed. This Court held that the warned statements properly were not suppressed because an initial failure to administer Miranda warnings before custodial questioning takes place does not forever disable a defendant from subsequently executing a valid waiver of his Miranda rights. This Court reasoned further that subsequently-warned statements are admissible notwithstanding an initial Miranda violation because the subsequent giving of Miranda warnings cures the initial Miranda violation.

This Court also focused in Elstad, as it did in Michigan v. Tucker, on the nature of the derivative evidence at issue. This Court noted that the derivative evidence in question, statements made by a living person who possesses the ability to exercise

violation, is not the same as derivative evidence in the form of "inanimate evidentiary objects." Elstad, 470 U.S. at 308-09 (quoting United States v. Ceccolini, 435 U.S. 268, 277 (1978)). This Court's holding in Elstad that "an initial failure of law enforcement officers to administer the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), without more, [does not] 'taint[]' subsequent admissions made after a suspect has been fully advised of and has waived his Miranda rights" does not decide the question decided by the court of appeals in this case, which is whether the fruit of the poisonous tree doctrine applies to physical-evidence fruit of a Miranda violation that is never subsequently cured. See Patterson v. United States, 485 U.S. 922, 922-23 (1988) (White, J., dissenting from denial of certiorari) ("While Elstad has been considered illuminating by some Courts of Appeals on the question of admissibility of *physical* evidence yielded from a Miranda violation, that decision did not squarely address the question presented here, and in fact, left the matter open.") (emphasis added).

3. Petitioner argues that the question the court of appeals decided in this case is an important one because it arises frequently. Petitioner asserts that the question arises frequently because the police often violate the constitutional requirements of Miranda.[2] (Pet. at 13). Assuming the validity of petitioner's

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[2] Petitioner's unsupported assertion that the police often violate Miranda appears to be contrary to this Court's observation in Dickerson that "Miranda has become embedded in routine police practice to the point where the warnings have

assertion that police officers often violate Miranda, this does not mean the question addressed by the court of appeals arises with frequency. The question addressed by the court of appeals was not what consequences flow from any violation of Miranda. Instead, it was what consequences flow when a police officer violates Miranda, the defendant makes a statement, the defendant's statement leads the police to derivative evidence, and the derivative evidence to which the police are led is in the form of an inanimate evidentiary object. Petitioner's assertion that the police often violate Miranda, even if true, does not support the leap in logic petitioner makes next, that "[t]he question whether Miranda requires exclusion not only of the suspect's unwarned statement but also its tangible fruits thus arises with some frequency." (Pet. at 13).

4. Petitioner further asserts that the question of whether a failure to comply with the requirements of Miranda "requires the suppression of physical evidence derived from the suspect's unwarned but *voluntary* statement" is squarely presented in this case. (Pet. at (I), (emphasis added). Such question is not in fact squarely presented, however, because whether Mr. Patane's statements were voluntary was a question raised but never decided in this case. This case is therefore an inappropriate vehicle for resolution of the question petitioner asks this Court to resolve.

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become part of our national culture." 530 U.S. at 443.

CONCLUSION

The court of appeals correctly followed this Court's precedents in applying the fruit of the poisonous tree doctrine to physical-evidence fruit of a Miranda violation. Further review is therefore unwarranted, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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NO. 02-1183

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

UNITED STATES OF AMERICA, *Petitioner*,

v.

SAMUEL FRANCIS PATANE, *Respondent*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

AFFIDAVIT OF SERVICE

Jill M. Wichlens, Assistant Federal Public Defender for the Districts of Colorado and Wyoming, hereby attests that pursuant to Supreme Court Rule 29, the preceding Brief for Respondent in Opposition and the accompanying Motion for

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Subscribed and sworn to before me this 14th day of March, 2003.

Clarita B Costigan
Clarita B. Costigan
Notary Public

My Commission Expires:
1-27-2005

NO. 02-1183

IN THE

SUPREME COURT OF THE UNITED STATES

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v.

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United States Court of Appeals
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Subscribed and sworn to before me this 14th day of March, 2003.

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Supreme Court, U.S.
FILED
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No. 02-1183

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SAMUEL FRANCIS PATANE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 02-1183

UNITED STATES OF AMERICA, PETITIONER

v.

SAMUEL FRANCIS PATANE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondent's opposition to certiorari does not address the critical reason why this Court should grant the petition: the courts of appeals are divided on whether a failure to give the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), mandates suppression not only of the defendant's unwarned statement, but also of any physical evidence derived from that unwarned statement.

As the petition explains (at 10-12), the court of appeals' holding here—that suppression of physical derivative evidence is required—conflicts with decisions of the Third and Fourth Circuits, which have held, after *Dickerson* v. *United States*, 530 U.S. 428 (2000), that a failure to give *Miranda* warnings never

requires the suppression of physical evidence derived from a defendant's unwarned but voluntary statement. See *United States* v. *DeSumma*, 272 F.3d 176, 180 (3d Cir. 2001) ("[T]he fruit of the poisonous tree doctrine does not apply to derivative evidence secured as a result of a voluntary statement obtained before *Miranda* warnings are issued."), cert. denied, 535 U.S. 1028 (2002); *United States* v. *Sterling*, 283 F.3d 216, 218-219 (4th Cir.) (reaffirming pre-*Dickerson* holding that "derivative evidence obtained as a result of an unwarned statement that was voluntary under the Fifth Amendment is never 'fruit of the poisonous tree'"), cert. denied, 536 U.S. 931 (2002). The Tenth Circuit's decision also conflicts with the First Circuit's post-*Dickerson* decision in *United States* v. *Faulkingham*, 295 F.3d 85 (2002), petition for cert. pending, No. 02-7385 (filed Oct. 7, 2002), in which the court used a case-by-case approach that requires the suppression of derivative physical evidence only when the need for deterrence outweighs the reliability of the evidence in the particular case, and that concluded that suppression was improper where the officers, in the heat of a fast-moving drug arrest, had simply neglected to give *Miranda* warnings to an arrestee who volunteered information. That conflict warrants this Court's resolution.

2. Respondent presents four arguments for denying review. Respondent contends that (1) *Dickerson* and *Wong Sun* v. *United States*, 371 U.S. 471 (1963), require suppression of the fruits of a constitutional violation (Br. in Opp. 9-10); (2) *Michigan* v. *Tucker*, 417 U.S. 433 (1974), and *Oregon* v. *Elstad*, 470 U.S. 298 (1985), do not resolve the question presented in this case (Br. in Opp. 10-13); (3) there is no showing that the question presented in this case arises frequently (Br. in Opp. 13-14);

and (4) this case is not a suitable vehicle for deciding whether *Miranda* requires suppression of physical evidence derived from an unwarned, but *voluntary* statement, because there was no determination by the trial court that respondent's statement was voluntary (Br. in Opp. 14-15). None of those contentions has merit.

a. The petition discusses (at 5-8) the relevant holdings of this Court that support the conclusion that suppression is not warranted when physical evidence is acquired as the fruit of a failure to give *Miranda* warnings. As noted above, three circuits have concluded that *Dickerson* did not cast doubt on that analysis. Whatever the merits of respondent's and the Tenth Circuit's contrary view, this Court alone can resolve the disagreement in the courts of appeals over the meaning of those precedents.

b. The petition also discusses this Court's decisions in *Tucker* and *Elstad*, explaining how the principles of those decisions establish that the fruits of an unwarned statement are admissible as long as the unwarned statement was voluntary. That *Tucker* and *Elstad* rested on additional points of analysis and can be distinguished factually (Br. in Opp. 10-13) does not undermine their relevance to the issue in this case. Cf. *Elstad*, 470 U.S. at 308 (relying on *Tucker*'s "reasoning" in concluding that the "absence of any coercion or improper tactics undercut[] the twin rationales—trustworthiness and deterrence"—for suppression of derivative evidence).

c. Respondent does not make any effort to show that the issue in this case lacks sufficient recurring importance to warrant this Court's review. In fact, it arises with regularity. That is not because officers are unfamiliar with *Miranda* (cf. Br. in Opp. 13-14 n.2), but because the taking of unwarned statements will inevitably

occur in the course of routine police work. As this Court recognized in *Elstad*, *Miranda* applies only when an individual is in "custody," but "the task of defining 'custody' is a slippery one, and 'policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever." 470 U.S. at 309 (quoting *Tucker*, 417 U.S. at 446). This case as well—in which respondent himself interrupted the officers during the reading of the *Miranda* warnings to advise them that "he knew his rights" (Pet. App. 4a)—provides an additional example of how officers acting in complete good faith can elicit unwarned statements that lead to derivative evidence.

The reported cases, both before and after *Dickerson*, reveal that officers commonly acquire derivative evidence as the result of unwarned statements. *United States* v. *Elie*, 111 F.3d 1135, 1140-1144 (4th Cir. 1997); *United States* v. *Crowder*, 62 F.3d 782, 786-787 (6th Cir. 1995), cert. denied, 516 U.S. 1057 (1996); *United States* v. *McCurdy*, 40 F.3d 1111, 1118-1119 (10th Cir. 1994); *United States* v. *Wiley*, 997 F.2d 378, 382-383 (8th Cir.), cert. denied, 510 U.S. 1011 (1993); *United States* v. *Gonzalez-Sandoval*, 894 F.2d 1043, 1047-1048 (9th Cir. 1990); *United States* v. *Sangineto-Miranda*, 859 F.2d 1501, 1515-1519 (6th Cir. 1988); *United States* v. *Cherry*, 794 F.2d 201, 207-208 & n.6 (5th Cir. 1986), cert. denied, 479 U.S. 1056 (1987); see *Patterson* v. *United States*, 485 U.S. 922, 922 n.1 (1988) (White, J., dissenting from denial of certiorari). The fact that four circuits have addressed the issue since *Dickerson*—and have reached three different legal conclusions—underscores the recurring importance of the issue.

d. Finally, that the lower courts have not adjudicated whether respondent's statement was voluntary does not mean that the question presented by the

petition (Pet. I) is not "squarely presented" (Br. in Opp. 14). On the facts of this case, there can be no serious question that respondent's unwarned statement was voluntary. *Miller* v. *Fenton*, 474 U.S. 104 (1985) (voluntariness requires independent review). There was no evidence of police coercion that might have overborne respondent's will and thereby violated due process. *Id.* at 116. Respondent was under arrest, but he was not threatened with harm, offered improper inducements, or physically abused. He made the statements in question moments after being taken into custody and immediately after telling the police that he knew his rights.

Quite apart from the facts of this case that establish voluntariness, however, the court of appeals' holding clearly precludes admission of the fruits of respondent's statements even assuming they were entirely voluntary. The court's decision rests on the fact that warnings were not given; the court did not remand for the district court to resolve the issue of voluntariness in the first instance. And the court based its holding on the view that "*Dickerson* now concludes that an un-Mirandized statement, *even if voluntary*, is a Fifth Amendment violation." Pet. App. 19a (emphasis added). In view of that reasoning, it is clear that the court of appeals crafted a rule requiring the suppression of reliable physical evidence derived from an unwarned statement to vindicate *Miranda*—even if the statement was voluntary within the meaning of the Due Process Clause. That sweeping holding, which conflicts with the holdings of other courts of appeals, warrants this Court's review.

* * * * *

For the forgoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

APRIL 2003

JUL 7 2003

No. 02-1183

In the
Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

SAMUEL FRANCIS PATANE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE STATES OF ALABAMA, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a failure to give the warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966), requires the suppression of physical evidence derived from the suspect's unwarned but voluntary statement.

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INTEREST OF AMICI CURIAE

The amici States have an interest equally as strong as the petitioner federal government in preserving public safety and in investigating and prosecuting crimes. The holding of the court of appeals in this case threatens this interest by posing an unnecessary barrier to the gathering and use of physical evidence by law enforcement officers. Amici submit this brief to urge this Court not to adopt an interpretation of *Miranda* that over-deters the good-faith efforts of their law enforcement officers to apprehend and prosecute criminals.

STATEMENT OF THE CASE

Respondent Samuel Francis Patane, a convicted felon, was arrested in Colorado Springs, Colorado, for violating a restraining order that prohibited him from contacting his ex-girlfriend. After Patane's arrest, Detective Josh Benner "began advising Patane of his *Miranda* rights, but only got as far as the right to silence when Patane said that he knew his rights."[1] Benner did not complete the *Miranda* warning. Instead, he proceeded to tell Patane that he was interested in what guns Patane owned and asked him in particular about a Glock. Patane informed Benner that the Glock was in his bedroom on a wooden shelf. "Detective Benner asked for permission to get the gun, which Patane granted, and Detective Benner ... found the gun where Patane described, and seized it."[2]

Patane was subsequently indicted in the United States District Court for the District of Colorado for

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[1] *United States v. Patane*, 304 F.3d 1013, 1015 (10th Cir. 2002).

[2] *Id.*

possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). The district court suppressed the evidence of the Glock, finding that the police did not have probable cause to arrest Patane in the first place.

On appeal, the United States Court of Appeals for the Tenth Circuit held that the police did have probable cause to arrest Patane.[3] The court of appeals nevertheless affirmed on the ground that the Glock was the fruit of an unwarned confession. Although this Court had previously held that evidence derived from unwarned confessions was not subject to the exclusionary rule, the Tenth Circuit found that *Dickerson v. United States*[4] had "fundamentally altered" the premise of these decisions — namely, "the premise that the *Miranda* rule was a prophylactic rule, rather than a constitutional rule."[5] If *Miranda* were no longer just prophylactic, the Tenth Circuit reasoned that its exclusionary rule should not be limited to the unwarned statement. Rather, the exclusionary rule should extend to the "fruit of the poisonous tree" — to the physical and other evidence derived from the unwarned statement. Accordingly, because Detective Benner had not finished the *Miranda* warning before eliciting information from Patane about the location of the Glock, the Tenth Circuit ruled that the evidence of the Glock was inadmissible.

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[3] *Patane*, 304 F.3d at 1018.

[4] 530 U.S. 428 (2000).

[5] *Patane*, 304 F.3d at 1019 ("In *Dickerson*, the Supreme Court declared that *Miranda* articulated a constitutional rule rather than merely a prophylactic one").

SUMMARY OF ARGUMENT

In *Michigan v. Tucker*,[6] and again in *Oregon v. Elstad*,[7] this Court rejected application of the "fruit of the poisonous tree" doctrine to the *Miranda* exclusionary rule. In both cases, this Court held that the prophylactic purposes of the *Miranda* warnings rule warranted the exclusion of the unwarned confession only, not the exclusion of other evidence that the police may have derived from that confession. The Tenth Circuit erred in concluding that *Dickerson* supplanted these holdings.

Whether *Miranda* is regarded as a judge-made remedy or as a rule of constitutional origin, it remains a prophylactic requirement. The reasons that this Court gave in *Tucker* and *Elstad* for limiting the prophylaxis of *Miranda* to the confession itself are as valid today after *Dickerson* as they were at the time of *Tucker* and *Elstad*. First, the exclusionary rule provides diminished deterrence when the police act in good faith, which is generally the case when the police elicit an unwarned but also uncoerced statement that leads to the discovery of other evidence. Second, the exclusionary rule serves no truth-seeking purpose when applied to evidence whose reliability can be confirmed independently of the unwarned confession through the adversarial processes of a criminal trial.

This conclusion is reinforced by the theory underlying the *Miranda* rule, as articulated in *Dickerson* and even more recently in *Chavez v.*

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[6] 417 U.S. 433 (1974).

[7] 470 U.S. 298 (1985).

Martinez.[8] The government does not violate the right against self-incrimination merely by eliciting an unwarned confession. It violates the right only if it attempts to use the unwarned confession during a later criminal proceeding. Evidence derived from an unwarned confession thus cannot be considered to be the fruit of a poisonous tree, because there is yet no poison. The constitutional violation is inchoate at best.

Finally, it is sensible that evidence derived from an unwarned, uncoerced statement should be subject to a less stringent rule of exclusion than evidence derived from a statement that the government elicited by actual coercion. Failing to administer *Miranda* warnings is not a "core" Fifth Amendment violation. Actual coercion, by contrast, violates due process. Only evidence derived from an actually coerced statement should be subject to the rule of exclusion.

ARGUMENT

I. Even After *Dickerson*, the Purpose of the *Miranda* Rule Remains Prophylactic, and So Evidence Derived From an Unwarned but Uncoerced Statement Still Should Not Be Subject to the Exclusionary Rule of *Miranda*.

For three decades, this Court has refused to transpose the "fruit of the poisonous tree" doctrine[9] to violations of *Miranda*. In *Michigan v. Tucker*, the Court held that a *Miranda* violation did not warrant the suppression of "the testimony of a witness whom the police discovered as a result of [the unwarned]

[8] 123 S. Ct. 1994 (May 27, 2003).

[9] *Wong Sun v. United States*, 371 U.S. 471 (1963) (evidence derived from Fourth Amendment violations not admissible at trial).

statements."[10] In *Oregon v. Elstad*, the Court held that the Self-Incrimination Clause of the Fifth Amendment did not require the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because police had obtained an earlier voluntary but unwarned admission from the suspect.[11] The Court found that "the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony [we]re fully satisfied ... by barring use of the unwarned statement in the case in chief."[12] On the basis of *Tucker* and *Elstad*, evidence derived from an unwarned statement has been deemed admissible at trial, even though the statement itself has not been.

Both *Tucker* and *Elstad* rest on the premise that *Miranda* warnings serve a prophylactic purpose. In these cases, this Court gave two reasons why the prophylactic purpose of the *Miranda* exclusionary rule did not warrant its application to evidence derived from an unwarned but otherwise voluntary statement. First, the exclusionary rule has diminished deterrent effect when the police act in good faith. In most cases, when the police elicit an uncoerced statement but did not precede it with *Miranda* warnings, it is fair to presume that the police acted in good faith. Here, for instance, Detective Benner's failure to complete the *Miranda* warning after Patane proclaimed he knew his rights appears to have been inadvertent and entirely bona fide. While it is still appropriate to exclude the unwarned statement at trial, so as to deter future negligence on the part of the police, it would over-deter

[10] 417 U.S. 433, 450 (1974).

[11] 470 U.S. 298, 317-18 (1985).

[12] *Id.* at 318.

the good-faith investigative efforts of the police to exclude not only the statement but also the evidence that the police were able to derive from that statement.

Second, the reliability of evidence discovered as the result of an unwarned statement can be confirmed independently of that statement. In this case, for instance, the police did not need Patane's statement to link him to the Glock once they found the Glock in his bedroom. Thus, the second prophylactic purpose of *Miranda* — to enhance the reliability of evidence used at trial — would not be served by a blanket rule prohibiting all derivative use.

These reasons for limiting the exclusionary rule to the unwarned statement are as valid today as they were in *Tucker* and *Elstad*. For years, state and federal law enforcement officers have relied on the availability of evidence derived from an unwarned, uncoerced statement. Stare decisis therefore counsels strongly against extension of the exclusionary rule to derivative evidence.

Furthermore, contrary to the holding of the Tenth Circuit, this Court's decision in *Dickerson v. United States* did not "fundamentally alter" the prophylactic purpose of *Miranda*.[13] In *Dickerson*, this Court clarified lingering confusion about the source of the *Miranda* doctrine by holding that it was constitutionally based and could not be overridden by statute. *Dickerson* did not state that it in any way affected the numerous other decisions of this Court implementing and refining *Miranda*.

The critical flaw in the Tenth Circuit's reasoning is the false dichotomy it draws between constitutional

[13] 530 U.S. 428 (2000).

and prophylactic rules. The court appears to have assumed that a prophylactic rule, because it covers more than just "core" violations of the constitutional right, is necessarily non-constitutional. As this Court's precedents make clear, however, a rule may be both constitutional and prophylactic. This Court has crafted other rules that, while prophylactic in purpose, are still constitutional in nature and so may not be overridden by statute or ignored by state courts.

The Fourth Amendment exclusionary rule is a notable example.[14] This Court has openly acknowledged that the Fourth Amendment exclusionary rule "fails to redress 'the injury to the privacy of the victim of the search or seizure' at issue, 'for any "[r]eparation comes too late."'"[15] Thus, the Fourth Amendment exclusionary rule, while undeniably constitutional in nature, cannot be justified as a direct remedy for the violation of a constitutional right. Rather, "[t]he purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits."[16] The

[14] *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) ("in the year 1914, in the *Weeks* case, this Court 'for the first time held that in a federal prosecution the Fourth Amendment barred use of evidence secured through an illegal search and seizure'").

[15] *Withrow v. Williams*, 507 U.S. 680, 686 (1993), *quoting Stone v. Powell*, 428 U.S. 465, 493 (1976), *quoting in turn Linkletter v. Walker*, 381 U.S. 618, 637 (1965).

[16] *Elstad*, 470 U.S. at 306 (citing *Dunaway v. New York*, 442 U.S. 200, 216-17 (1979); *Brown v. Illinois*, 422 U.S. 590, 600-02 (1975)); *see also Tucker*, 417 U.S. at 446 (the "prime purpose" of the Fourth Amendment exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures") (quoting *United States v. Calandra*, 414 U.S. 338, 347 (1974)).

prophylactic purpose of the Fourth Amendment exclusionary rule explains the "good faith" exception that has been recognized by this Court.[17] If the objective of the Fourth Amendment exclusionary rule were just to remedy the constitutional violation, the officer's subjective mindset in committing the violation would not be relevant. By establishing the "good faith" exception, this Court made plain that "the exclusionary rule [wa]s designed to deter" future violations of the Fourth Amendment.[18] The rule is not itself a constitutional right, "but ... instead [a] measure to ensure that [the core] constitutional right[is] protected."[19]

Another example is the general warrant requirement of the Fourth Amendment. "[I]n 'the ordinary case,' seizures of personal property are 'unreasonable within the meaning of the Fourth Amendment,' ... 'unless ... accomplished pursuant to a judicial warrant,' issued by a neutral magistrate after finding probable cause."[20] Yet the text of the Fourth Amendment itself contains no requirement that a warrant be sought prior to any search or seizure.

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[17] *See United States v. Leon*, 468 U.S. 897, 926 (1984) (holding that when "officers' reliance on [a] magistrate's determination of probable cause was objectively reasonable, [the] application of the extreme sanction of exclusion is inappropriate").

[18] *Id.* at 916.

[19] *Michigan v. Harvey*, 494 U.S. 344, 351 (1990).

[20] *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (quoting *United States v. Place*, 462 U.S. 696, 701 (1983)); *see also Katz v. United States*, 389 U.S. 347, 357 (1967) ("searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions").

Rather, it consists of "two prohibitory Clauses."[21] "The first Clause prohibits unreasonable searches and seizures and the second prohibits the issuance of warrants that are not supported by probable cause or that do not particularly describe the place to be searched and the persons or things to be seized."[22] The presumptions attached to the lack of a warrant have therefore been created by the Court as a prophylactic measure, designed to protect the core constitutional right against unreasonable searches and seizures.

Final examples are the prophylactic rules undergirding the rights to counsel in the Fifth and Sixth Amendments. In *Edwards v. Arizona*,[23] the Court "added a layer of protection to the *Miranda* rules, holding that 'when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.'"[24] "*Edwards* thus established [a] prophylactic rule,"[25] "designed to implement pre-existing rights."[26] In *Michigan v.*

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[21] *Leon*, 468 U.S. at 960 (Stevens, J., concurring in part and dissenting in part).

[22] *Id.*

[23] 451 U.S. 477 (1981).

[24] *Michigan v. Harvey*, 494 U.S. 344, 350 (1990) (quoting *Edwards*, 451 U.S. at 484).

[25] *Id.* at 350.

[26] *Solem v. Stumes*, 465 U.S. 638, 645 (1984); see also *id.* at 645 (holding that *Edwards* was not to be applied retroactively, at least in part, because it is merely prophylactic and, therefore, "a far cry from the sort of decision that goes to the heart of the truthfinding function").

Jackson,[27] the Court "simply superimposed the Fifth Amendment analysis of *Edwards* onto the Sixth Amendment,"[28] thereby crafting a "prophylactic rule ... designed to ensure voluntary, knowing, and intelligent waivers of the Sixth Amendment right to counsel."[29]

No one would say that these various protections are non-constitutional in nature and thus may be overridden by statute or ignored by state courts. These rules — while "merely" prophylactic in that they do not directly convey a constitutional right — are still constitutional in nature because they buttress an underlying constitutional right. The same holds true for *Miranda*. "'Prophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a *fundamental trial right*.'"[30]

In short, *Dickerson* did nothing, either expressly or by implication, to disavow this Court's previous decisions characterizing the *Miranda* rule as "prophylactic." *Dickerson* clarified that the warnings required bv *Miranda* were constitutional in nature but it did not thereby alter their prophylactic purpose.

Indeed, just last Term, in *Chavez v. Martinez*, at least six members of this Court appeared to endorse a characterization of *Miranda* as prophylactic. Four members of the Court — including the Chief Justice,

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[27] 475 U.S. 625 (1986).

[28] *Harvey*, 494 U.S. at 350.

[29] *Id.* at 351.

[30] *Withrow v. Williams*, 507 U.S. 680, 691 (1993) (emphasis added) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)).

who authored *Dickerson* — said: "We have ... established the *Miranda* exclusionary rule *as a prophylactic measure* to prevent violations of the right protected by the text of the Self-Incrimination Clause ...." [31] Two other members of the Court described *Miranda* as a "complementary rule in service of the core privilege" of the Fifth Amendment — language that appears synonymous with a characterization of *Miranda* as prophylactic.[32]

In view of these statements and the foregoing analysis, the Tenth Circuit was incorrect in concluding that *Dickerson* had implicitly overruled *Tucker* and *Elstad*. The *Miranda* rule was and is prophylactic. For the reasons set forth in *Tucker* and *Elstad*, the prophylactic purposes of the *Miranda* rule do not warrant an exclusionary rule that extends to evidence derived from an unwarned, uncoerced statement.

II. The "Fruit of the Poisonous Tree" Doctrine Should Not Apply to an Unwarned, Uncoerced Statement, Because the Government Does Not Violate the Fifth Amendment Unless and Until It Attempts to Use That Statement During a Later Criminal Proceeding.

The proposition that the *Miranda* exclusionary rule should not extend to derivative evidence is reinforced

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[31] 123 S. Ct. 1994, 2003 (May 27, 2003) (Thomas, J., joined by Rehnquist, C.J., and O'Connor and Scalia, JJ.). *See also id.* at 2008 (Scalia, J.) ("Section 1983 does not provide remedies for violations of judicially created prophylactic rules, such as the rule of *Miranda* ... as the Court today holds").

[32] *Id.* at 2007 (Souter, J., joined by Breyer, J.). *But see id.* at 2012 n. 3 (Stevens, J.) ("the Court disavowed the 'prophylactic' characterization of *Miranda* in *Dickerson*").

by the theory underlying the right against self-incrimination. When Detective Benner questioned Patane about the location of the Glock without completing the *Miranda* warnings, he did not violate the Self-Incrimination Clause of the Fifth Amendment. Even if he had coerced the statement from Patane, he still would not have violated the Self-Incrimination Clause (although he then would have violated due process[33]). Only if the government had later attempted to use Patane's unwarned statement at a criminal trial would it have violated the Fifth Amendment.

It thus makes no sense to treat evidence derived from Patane's statement as "fruit of the poisonous tree." At the time of the statement, there was no "poison." The government had not yet violated the Constitution.

This Court has long held that the government does not violate the right to self-incrimination unless and until it attempts to compel a defendant's testimony at trial. The text of the Self-Incrimination Clause makes this point clear. No one "shall be compelled *in any criminal case* to be a witness against himself ...."[34] Thus, "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial* right of criminal defendants."[35] "Although conduct by law enforcement officials prior to trial may

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[33] *See* n. 44.

[34] U.S. Const., amend. V, cl. 3.

[35] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (citing *Malloy v. Hogan*, 378 U.S. 1 (1964)) (emphasis added).

ultimately impair that right, *a constitutional violation occurs only at trial.*"[36]

Once again, this Court's recent decision in *Chavez v. Martinez*[37] is instructive. In *Chavez*, this Court reaffirmed that the government violates the right against self-incrimination only if it attempts to use an individual's statements against him at trial. Four Justices opined that the respondent in *Chavez* could not claim the violation of a constitutional right, even though the police had in some fashion pressured his statement, on the ground that he "was never made to be a 'witness' against himself in violation of the Fifth Amendment's Self-Incrimination Clause because his statements were never admitted as testimony against him in a criminal case."[38] "Statements compelled by police interrogations of course may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs ...."[39] Two other Justices, while disagreeing with the plurality that the respondent could not claim a violation of due process, agreed that "the text of the Fifth Amendment ... focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony, and the core of the guarantee

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[36] *Id.* (emphasis added) (citing *Kastigar v. United States*, 406 U.S. 441, 453 (1972)).

[37] 123 S. Ct. 1994 (May 27, 2003).

[38] *Id.* at 2001 (Thomas, J., joined by Rehnquist, C.J., O'Connor and Scalia, JJ.).

[39] *Id.* (citation omitted).

against compelled self-incrimination is the exclusion of any such evidence."[40]

The timing of the constitutional violation explains why the Fourth Amendment exclusionary rule, while also prophylactic in purpose, sweeps more broadly than *Miranda*. An illegal search or seizure violates the Fourth Amendment at the time the police conduct it. The poison has already been introduced, and any evidence derived from the search or seizure is accurately considered "fruit of the poisonous tree."

But when the police violate *Miranda* by failing to advise a suspect of his rights before questioning, the constitutional violation is at best inchoate. The government can still avoid a constitutional violation by choosing not to introduce the suspect's testimony during a later criminal proceeding. For this reason also, evidence derived from an unwarned confession should not be subject to the *Miranda* exclusionary rule.

III. An Unwarned, Uncoerced Statement Should Be Subject to a Less Stringent Rule of Exclusion Than a Coerced Statement That Violates Due Process.

It is important to distinguish confessions that are unwarned *and* coerced from confessions that unwarned but voluntary. "There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but

[40] *Id.* at 2006 (Souter, J., concurring in the judgment, joined by Breyer, J.).

noncoercive question, as in this case."[41] Detective Benner did not force Patane to divulge where he had the gun.[42] "[T]he police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege."[43]

Had the police in this case actually compelled Patane's statement about the Glock by force or threat of force, they would have violated due process[44] in addition to *Miranda*. In that case, the Glock would justifiably have been subject to the rule of exclusion.[45]

[41] *Elstad*, 470 U.S. at 312.

[42] Indeed, following Patane's unwarned statement, Detective Benner asked for permission to get the gun, and Patane granted it. In *Elstad*, the respondent gave an unwarned, verbal inculpatory statement to the police; he was subsequently administered *Miranda* warnings, and gave a second, written inculpatory statement. This Court rejected the respondent's contention that his written statement should be excluded because of the earlier *Miranda* violation, noting that intervening events may cause a suspect to give a subsequent admissible statement that is left untainted by a previous *Miranda* violation. *Elstad*, 105 S. Ct. at 1296. Similarly, Patane's decision to give permission to Detective Benner to obtain his gun may be construed as a voluntary act that renders the prior *Miranda* violation of no effect on the admissibility of the gun.

[43] *Tucker*, 417 U.S. at 445-46.

[44] *Dickerson*, 520 U.S. at 434 ("If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant") (quoting *Malinski v. New York*, 324 U.S. 401, 404 (1945)); *Haynes v. Washington*, 373 U.S. 503, 513 (1963) ("a confession obtained by police through the use of threats is violative of due process").

[45] *New York v. Quarles*, 467 U.S. 649, 672 (1984) (O'Connor, concurring in part and dissenting in part) ("when the *Miranda* violation consists of a deliberate and flagrant abuse of the accused's

The constitutional violation would have been immediate, and the evidence derived from the statement would have been fruit of the constitutionally poisonous tree.

It is sensible that a less stringent rule of exclusion — covering only the statement itself and not evidence derived from the statement — should apply to an unwarned but uncoerced statement. It is enough that the uncoerced statement is already subject to exclusion. In the context of uncounseled but voluntary statements given after the police re-initiate conversation, this Court has stated:

> We have mandated the exclusion of reliable and probative evidence for all purposes only when it is derived from involuntary statements. [*New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (compelled incriminating statements inadmissible for impeachment purposes); *Mincey v. Arizona*, 437 U.S. 385, 398 (1978) (same).] We have never prevented use by the prosecution of relevant voluntary statements by a defendant, particularly when the violations alleged by a defendant relate only to procedural safeguards that are "not themselves rights protected by the Constitution," [*Tucker*, 417 U.S. at 444 (*Miranda* rules),] but are instead measures designed to ensure that constitutional rights are protected. In such cases, we have decided that the "search for truth in a criminal case" outweighs the "speculative possibility" that exclusion of evidence might deter future

constitutional rights, amounting to a denial of due process, application of a broader exclusionary rule is warranted").

> violations of rules not compelled directly by the Constitution in the first place.[46]

Likewise here, excluding evidence derived from an unwarned, uncoerced statement would result in over-deterrence and needlessly deprive the justice system of evidence whose probity can be independently corroborated.

The absence of actual coercion also serves to distinguish the long line of cases in which this Court has held that "immunity from use *and derivative use* is coextensive with the scope of the privilege against self-incrimination."[47] These cases address the scope of immunity that the government must grant to a witness if it intends to force the witness, on pain of contempt, to testify at trial. In such circumstances, the government is not even hiding the fact that it intends to employ actual coercion to make the witness give a potentially inculpatory statement at a criminal trial. Were the government not to afford immunity, it would violate both due process and the right against self-incrimination by forcing the witness to testify. A broader privilege — prohibiting use *and* derivative use of the compelled testimony at a future criminal proceeding — is accordingly appropriate to staunch the constitutional poison and keep it from spreading.

In the absence of actual coercion, however, an unwarned statement should not trigger an exclusionary rule that is "coextensive with the privilege

[46] *Michigan v. Harvey*, 494 U.S. 344, 351-52 (1990) (holding that uncounseled statements may still be used for impeachment).

[47] *Kastigar v. United States*, 406 U.S. 441, 453 (1972) (emphasis added). *See also Brown v. Walker*, 161 U.S. 591 (1896); *Ullmann v. United States*, 350 U.S. 422 (1956).

against self-incrimination." Again, *Miranda* remains prophylactic, even if constitutionally based. Indeed, in *Dickerson*, this Court expressly declined to hold that "*Miranda* warnings are required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements."[48] For the prophylactic purposes of *Miranda*, it is sufficient that the unwarned statement itself be excluded. Evidence that is derived from the unwarned statement, like the Glock in this case, should continue to be admissible.

IV. If *Dickerson* So "Fundamentally Altered" the Nature of *Miranda* As To Change the Scope of the Exclusionary Rule, Then the Limits That This Court Has Imposed on Other Constitutionally-Based Prophylactic Protections Will Also Be Called Into Question.

Finally, the Tenth Circuit's ruling in this case calls into question the scope of other prophylactic protections that are presumably constitutionally based. For example, this Court has acknowledged that the *Jackson* rule excluding uncounseled statements made after the police re-initiate questioning is a "judicially created protection."[49] Accordingly, this Court has held that "the prosecution may use a statement taken in violation of the *Jackson* prophylactic rule to impeach a defendant's false or inconsistent testimony."[50] By the reasoning of the Tenth Circuit, however, a determination that the *Jackson* rule is constitutionally based would undermine this Court's reliance on the

[48] 530 U.S. at 442.

[49] *Michigan v. Harvey*, 494 U.S. 344, 351 (1990).

[50] *Id.* at 345-46.

"prophylactic" purpose of the rule in holding that a statement taken in violation of the rule may nevertheless be used to impeach. The same fate would logically befall any decisions of this Court that relied upon the "prophylactic" nature of a rule for imposing some sort of limit on its reach. In short, if this Court were to embrace the logic of the Tenth Circuit's ruling, it might open a Pandora's box of litigation in which the scope of this Court's various prophylactic doctrines will all have to be reassessed on the theory that they are constitutionally based.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

SAMUEL FRANCIS PATANE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether a failure to give a suspect the warnings prescribed by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), requires the suppression of physical evidence derived from the suspect's unwarned but voluntary statement.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

SAMUEL FRANCIS PATANE,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the suppression of evidence of a crime which is indisputably reliable, for reasons involving no actual violation of constitutional rights and of dubious value in safeguarding constitutional rights. The cost of suppression in

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

a case such as this vastly outweighs the benefits, and suppression is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The relevant facts, as stated in the Court of Appeals' opinion, can be briefly stated. Colorado Springs police arrested defendant Samuel Patane for violation of a harassment restraining order on June 6, 2001, three days after his release from the county jail. *United States* v. *Patane*, 304 F. 3d 1013, 1014-1015 (CA10 2002). They had information that Patane was a convicted felon and that he possessed a Glock .40 caliber pistol. "Detective Benner began advising Patane of his *Miranda* rights, but only got as far as the right to silence when Patane said that he knew his rights. No further *Miranda* warnings were given, a fact which the Government concedes on appeal resulted in a *Miranda* violation." *Id.*, at 1015.[2] Upon questioning about the gun, Patane told the officers it was in his bedroom and gave them permission to retrieve it. *Ibid.*[3]

Patane was indicted in federal court for possession of a firearm by a convicted felon in violation of 18 U. S. C. § 922(g)(1). The District Court ordered that the gun be suppressed as evidence, on the ground that the police did not have probable cause to arrest Patane. *Id.*, at 1014. The Court of Appeals concluded that the police did have probable cause, but it nonetheless affirmed the suppression order on the theory that the gun was the "fruit" of the *Miranda* violation. *Ibid.*

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2. *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Amicus* CJLF does not believe that this concession was correct. See Part I, *infra*.

3. Defendant disputes that he gave permission. See Brief in Opposition 5, n. 1.

SUMMARY OF ARGUMENT

On the facts of this case, it is doubtful whether a violation of the *Miranda* rule occurred. This Court has not ruled on the question, and other courts are divided. The issue should be expressly reserved, to be decided in a case where it is contested. The split of authority on the point, however, is relevant in that it shows that the police in this case acted in good faith and that the "bright-line" rule of *Miranda* is not as bright as advertised.

Dickerson v. *United States* affirmed the *Miranda* body of jurisprudence in its entirety, including the exceptions and limitations of the rule, and specifically including *Michigan* v. *Tucker* and *Oregon* v. *Elstad*.

Miranda is a rule developed to manage the risk that the inquiry into voluntariness of a statement might be decided incorrectly. Its conclusive presumption is doubtful even in its core area of operation and should not be extended beyond the core. The same balance of factors that led to admission of the evidence in *Tucker* and *Elstad* is present in this case, and it should produce the same result.

ARGUMENT

I. There may not have been a *Miranda* violation in this case.

The District Court in this case held that the rule of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) was violated when the police failed to read Patane the complete warnings, despite his spontaneous assertion that he already knew his rights. See *United States* v. *Patane*, 304 F. 3d 1013, 1018 (CA10 2002). The Government did not challenge this holding in the Court of Appeals, see *ibid.*, or in its petition for certiorari. See Pet. for Cert. i. Under these circumstances, this Court will not normally decide the correctness of such a holding. See, *e.g.*, *California* v. *Hodari D.*, 499 U. S. 621, 623, n. 1 (1991). Although the

Court does on occasion consider issues raised only by *amici*, see, *e.g.*, *Mapp* v. *Ohio*, 367 U. S. 643, 646, n. 3 (1961) (Fourth Amendment raised only by *amicus*); *Teague* v. *Lane*, 489 U. S. 288, 300 (1989) (plurality opinion) (retroactivity), the present case is more like *Hodari D.* than *Teague*.

Even so, the debatable nature of the District Court's finding of a violation is important for two reasons. First, the opinion in this case should be explicit that the "violation" is merely assumed and not decided, as was done in *Hodari D.* In that case, the state conceded that the police officer did not have "reasonable suspicion" for a stop when Hodari fled at the sight of the officer. By explicitly noting that the point was conceded rather than decided, the *Hodari D.* Court kept the issue open for another case, in which another state chose to contest it. See *Illinois* v. *Wardlow*, 528 U. S. 119 (2000). The present case is a mirror image of *Colorado* v. *Spring*, 479 U. S. 564, 572, n. 4 (1987). In that case, the "fruit" question was conceded, and the case was decided on the legality of the questioning. In this case, the "fruit" question is the question presented, while the alleged *Miranda* violation should be assumed and expressly not decided. See also *Oregon* v. *Elstad*, 470 U. S. 298, 315 (1985) (custody conceded and assumed, not decided).

Second, the fact that the propriety of the officers' actions in this case was an open question at the time of the arrest, and indeed remains an open question today, may be significant. More than once in its *Miranda* jurisprudence, this Court has noted the absence of any intentional misconduct on the part of the investigating officers. See, *e.g.*, *Michigan* v. *Tucker*, 417 U. S. 433, 447-448 (1974) (noting questioning occurred before *Miranda*); *Elstad*, 470 U. S., at 309 (characterizing officer's belief that suspect was not yet in custody as "error"). The issue of intentional noncompliance is presented in another case presently before the Court, *Missouri* v. *Seibert*, No. 02-1371.

The *Miranda* opinion itself disclaimed any suggestion that the procedures laid out in it were exclusive, and alternatives were expressly allowed so long as they were equally effective.

See 384 U. S., at 467. "The purpose of the *Miranda* warnings . . . is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's Fifth Amendment rights." *Moran* v. *Burbine*, 475 U. S. 412, 425 (1986). An arrestee who interrupts the police warnings to assert that he knows his rights and that the warnings are not necessary has demonstrated both the knowledge that he has rights regarding interrogation and the assertiveness necessary to stand up for his rights. The facts of this case demonstrate a *less* compulsive atmosphere than the typical case of *Miranda* compliance, where the police read rights to a passive subject and get his signature on a waiver form. If an arrestee can waive the constitutional rights protected by the *Miranda* warning procedure, it would seem very strange that he cannot waive the warnings themselves, particularly where he does so entirely spontaneously. To hold that there was a violation in this case would be to create a rule of "talismanic incantation" of the type this Court rejected long ago. See *California* v. *Prysock*, 453 U. S. 355, 359 (1981) (*per curiam*).

Courts around the nation are divided on the question of whether the arrestee's spontaneous assertion of knowledge of his rights eliminates the requirement for the police to read them. See 2 W. LaFave, J. Israel, & N. King, Criminal Procedure § 6.8(a), p. 572 (2d ed. 1999). A number of cases hold that the assertion does eliminate the warning requirement or, equivalently, that the arrestee has waived the warning. See, *e.g.*, *State* v. *Perez*, 157 N. W. 2d 162, 164 (Neb. 1968); *State* v. *Wilson*, 268 N. E. 2d 814, 817 (Ohio App. 1971); *State* v. *Thomas*, 553 P. 2d 1357, 1363 (Wash. App. 1976); *State* v. *Walden*, 336 N. W. 2d 629, 632 (N. D. 1983); *contra Dupont* v. *United States*, 259 A. 2d 355, 358-359 (D. C. 1969). While this split need not and should not be resolved in the present case, it cannot be denied that the officers' belief that their actions complied with the *Miranda* rule was supported by substantial authority.

II. *Dickerson* reaffirmed this Court's *Miranda* jurisprudence in its entirety, including *Tucker* and *Elstad*.

The Supreme Court precedents which come closest to the present case are *Michigan* v. *Tucker*, 417 U. S. 433, 452 (1974) and *Oregon* v. *Elstad*, 470 U. S. 298, 308 (1985). In both of these cases, this Court held that "fruits" of a statement taken without complying with the *Miranda* rule were admissible. The Court of Appeals in the present case excluded the "fruits" despite these precedents by two means. First, it held that *Dickerson* v. *United States*, 530 U. S. 428 (2000) had "fundamentally altered" the law in this area and "undermined the logic underlying *Tucker* and *Elstad*." *United States* v. *Patane*, 304 F. 3d 1013, 1019 (CA10 2002). Second, the Court of Appeals read the precedents very narrowly to draw a distinction for this purpose between physical objects and living witnesses, either the defendant's own statement or the identity of another witness. See *id.*, at 1022. The first of these arguments is addressed in this part, and the second in the next part.

The Court of Appeals' thesis that *Dickerson* "fundamentally altered" the premises of important precedents is a surreal reading of that decision. *Dickerson* is a resounding affirmation of precedent. The Court made no attempt to defend *Miranda* as an initially correct decision, but instead declared that "the principles of *stare decisis* weigh heavily against overruling it now." 530 U. S., at 443. *Dickerson* quoted with approval the statement of Chief Justice Burger, concurring in the judgment in *Rhode Island* v. *Innis*, 446 U. S. 291, 304 (1980) (emphasis added), "I would neither overrule *Miranda*, disparage it, *nor extend it* at this late date." *Dickerson*, *supra*, at 443. Certainly, to undermine the limitations on *Miranda*, including *Tucker* and *Elstad*, would be to extend it. Yet *Dickerson* expressly rejected the notion that there was inconsistency between *Miranda* and the limiting decisions. "If anything, our subsequent cases have reduced the impact of *Miranda* on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's

case in chief." *Id.*, at 443-444. *Dickerson* does not undermine any portion of the *Miranda* body of jurisprudence, but instead reaffirms it as a coherent whole.

To be sure, the Fourth Circuit in *Dickerson* did rely on statements in *Tucker* and other cases to the effect that *Miranda* was a prophylactic rule for its conclusion that *Miranda* was not a constitutional rule. See *United States* v. *Dickerson*, 166 F. 3d 667, 672 (CA4 1999). This reasoning could be stated as a syllogism:

> No prophylactic rules are constitutional rules.
> *Miranda* is a prophylactic rule.
> Therefore, *Miranda* is not a constitutional rule.

The Court of Appeals in the present case appears to have assumed that, in rejecting the conclusion of this syllogism, see 530 U. S., at 438, the *Dickerson* Court necessarily rejected the minor premise. The obvious alternative is that the Court rejected the major premise. It is possible for a prophylactic rule to be a constitutional requirement.

The two-witness rule for treason, see U. S. Const., Art. III, § 3, is a prophylactic rule of sorts. Certainly it does not create a substantive right to commit an act of treason which is only witnessed by one person. Like *Miranda*, it is a bright-line rule of evidence that certain evidence will be required for a particular purpose regardless of how clearly other available evidence may prove the underlying fact. This rule represents a value judgment by the Framers that the danger of erroneous conviction of treason on the word of one liar outweighs the need of the government to obtain convictions in single-witness cases. See J. Story, Commentaries on the Constitution of the United States § 943, pp. 671-672 (abridged ed. 1833) (reprint 1987). Yet this rule is in the Constitution in black and white and not subject to legislative repeal.

Dickerson reaffirms that the *Miranda* procedures, or equally effective alternatives, are required for the product of in-custody interrogation to be included in the prosecution's case in chief,

and that this rule is a constitutional mandate. That holding is consistent with the statements in earlier cases that characterize *Miranda* as a prophylactic rule, note that it sweeps more broadly than the Fifth Amendment itself, and state that the warnings themselves are not constitutional rights. Specifically addressing *Elstad*, *Dickerson* unmistakably holds that "refusing to apply the traditional 'fruits' doctrine" is not inconsistent with the constitutional status of *Miranda*. 530 U. S., at 441.

If that were not clear enough from the face of the *Dickerson* opinion, the recent decision in *Chavez* v. *Martinez*, 538 U. S. __ (No. 01-1444, May 27, 2003) eliminated any residual doubt. Interpretation of this precedent is complicated by the fact that there is no majority opinion. Even so, we can see from the separate opinions that *Dickerson* did not undermine the cases limiting *Miranda*, including *Tucker* and *Elstad*.

On the Fifth Amendment question, the opinions concurring in the judgment are those of Justice Thomas and Justice Souter. We need not answer the often-difficult riddle of which opinion is "narrower," see *Marks* v. *United States*, 430 U. S. 188, 193 (1977); *Nichols* v. *United States*, 511 U. S. 738, 745-746 (1994); *Grutter* v. *Bollinger*, 539 U. S. __ (No. 02-241, June 23, 2003) (slip op., at 12-13), because the two are consistent on this point. Indeed, Part I of Justice Kennedy's opinion is also consistent to the extent relevant here.

Justice Thomas' opinion reaffirms that *Miranda* is a prophylactic rule, even though it is a constitutionally required prophylactic rule. *Chavez* (slip op., at 8, 10). *Tucker* and *Elstad* are cited and relied on as precedent for the same premises that the Court of Appeals in the present case believed had been undermined by *Dickerson*. Compare *id.* (slip op., at 9), with 304 F. 3d, at 1019. "Rules designed to safeguard a constitutional right, however, do not extend the scope of the constitutional right itself, just as violations of traditionally crafted prophylactic rules do not violate the constitutional rights of any person." *Chavez* (slip op., at 10). From this post-*Dickerson* opinion, we see that *Miranda*'s status as a prophylactic rule remains intact. Asking a question of an arrestee without reading the *Miranda* warnings, by itself, is not a violation of the arrestee's rights.

Justice Souter's opinion characterizes the *Miranda* rule as "conditioning admissibility on warnings and waivers to promote intelligent choices and to simplify subsequent inquiry into voluntariness . . . ." *Id.* (slip op., at 2) (Souter, J., concurring in the judgment). This correct, complete, yet brief statement may be the best description of *Miranda* yet. "Conditioning admissibility" designates *Miranda* as a rule of evidence rather than a rule of substantive law. The policy reasons given for the *Miranda* rule imply that the rule will be limited when countervailing reasons of policy outweigh the reasons for extending the rule of exclusion. Justice Souter refers to *Miranda* as a "complementary rule," rather than a prophylactic rule, *id.* (slip op., at 3), but this variation on the traditional terminology would not seem to make any difference. Cf. *Connecticut* v. *Barrett*, 479 U. S. 523, 528 (1987) ("auxiliary barrier").

In this view, any extension of *Miranda*'s "complementary rule" must be justified by a showing that the extension is necessary because the existing remedies are insufficient to protect the core Fifth Amendment privilege. *Chavez*, *supra*, (slip op., at 3) (Souter, J., concurring in the judgment). For the reasons discussed in Part III, *infra*, *Tucker* and *Elstad* are based on the Court's judgment that extension beyond exclusion of the statement itself is not necessary. Nothing in *Dickerson* is remotely contrary to that judgment, and hence these cases are still good law.

Although Justice Kennedy's opinion is a dissent on the Fifth Amendment question, it is worth noting that this opinion is also consistent with the view that *Dickerson* did not undermine the limitations on *Miranda* established in this Court's cases. *Dickerson* established that *Miranda* is "a constitutional requirement." *Chavez*, *supra* (slip op., at 2) (Kennedy, J., concurring in part and dissenting in part). That requirement,

however. is "a rule of exclusion," *ibid.*, *i.e.*, a rule of evidence and not a rule of substantive law. The pre-*Dickerson* exceptions to *Miranda*'s rule of exclusion are alive and well. *Ibid.* (citing *Harris* v. *New York*, 401 U. S. 222 (1971)). "The exclusion of unwarned *statements*, when not within an exception, is a complete and sufficient remedy." *Ibid.* (emphasis added).

The only indication in any of the opinions in *Chavez* that *Dickerson* changed anything in the *Miranda* body of jurisprudence is a statement in footnote 3 of Justice Stevens' opinion that "the Court disavowed the 'prophylactic' characterization of *Miranda* in *Dickerson* . . . ." This opinion was not joined by any other Justice, and the statement is contrary to those in opinions joined by a majority, as discussed *supra*.

In short, *Chavez* confirms that *Dickerson* did not change the distinction drawn in prior cases between noncompliance with *Miranda* and actual coercion. The main premise of the Court of Appeals' thesis is therefore false. The physical "fruit" of the questioning of Patane can be suppressed only if *Tucker* and *Elstad* can be meaningfully distinguished or if they should be independently overruled. As we will show in the next part, those decisions were correct, and the balancing of costs and benefits that produced those decisions produces the same result here.

III. The *Miranda* rule is a device for allocating the risk of uncertainty that is doubtful even in its core area of operation, and it should not be extended anywhere outside the core.

A. Miranda As Risk Management.

"In *Miranda* [v. *Arizona*, 384 U. S. 436 (1966)], the Court noted that reliance on the traditional totality-of-the-circumstances test raised a *risk* of overlooking an involuntary custodial confession, 384 U. S., at 457, a risk that the Court found

unacceptably great when the confession is offered in the case in chief to prove guilt." *Dickerson* v. *United States*, 530 U. S. 428, 442 (2000) (emphasis added). This statement captures the essence of the *Miranda* rule, whether it be called a "prophylactic rule," a "complementary rule," or an "auxiliary barrier." Simply taking a statement from an arrestee without reading warnings is not wrong in itself. The problem is the risk that the voluntariness inquiry might be answered incorrectly. "A *Miranda* violation does not *constitute* coercion, but rather affords a bright-line, legal presumption of coercion . . . ." *Oregon* v. *Elstad*, 470 U. S. 298, 307, n. 1 (1985) (emphasis in original).

In the artificial atmosphere of law school, students typically take the facts as given and discuss at length what result should follow from those facts. The real world is considerably messier. Rules of law must be fashioned with the knowledge that the fact-finding process is fallible. In cases where error in one direction is thought to cause a greater injustice than error in the other, rules may be shaped to minimize the probability of the former error at the cost of multiplying the latter errors. The prosecution's heavy burden of proof beyond a reasonable doubt in criminal cases is expressly premised on the belief "that it is better that ten guilty persons escape, than that one innocent suffer." 4 W. Blackstone, Commentaries 352 (1st ed. 1769); see also *In re Winship*, 397 U. S. 358, 364 (1970). And escape they do, on a regular basis. See, *e.g.*, *Rufo* v. *Simpson*, 86 Cal. App. 4th 573, 103 Cal. Rptr. 2d 492 (2001) (defendant acquitted of double murders in criminal trial, found in subsequent civil trial to have actually committed them).

A second circumstance that may justify a bright-line rule is when the uncertainty in the evidence could easily have been avoided by the party on the losing side of the bright line. The statute of frauds is such a rule. A party who wants to be sure he can enforce important contracts can simply get them in writing, but there is no simple way to protect oneself against false claims of oral contracts. The law protects against the risk of

false claims of oral contracts by making them unenforceable for certain important matters, see, *e.g.*, Cal. Civ. Code § 1624(a), knowing that the cost will be that some genuine contracts are not enforced. The cost is acceptable, because people can easily guard against it.

The bright-line rule of *Miranda* has elements of both of these rationales:

> "In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate *safeguards* to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The *potentiality* for compulsion is forcefully apparent. . . . The fact remains that in none of these cases *did the officers undertake* to afford appropriate safeguards at the outset of the interrogation to *insure* that the statements were truly the product of free choice." 384 U. S., at 457 (emphasis added).

The *Miranda* Court's concern for the "potentiality of compulsion" would not be an issue if courts were capable of infallible determination of actual compulsion. The uncertainty of that determination is what makes necessary *Miranda*'s procedures to "insure" voluntariness. *Miranda* "concluded that the coercion inherent in custodial interrogation *blurs the line* between voluntary and involuntary statements, and thus heightens the *risk* that an individual will not be 'accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.' " *Dickerson*, 530 U. S., at 435 (emphasis added) (quoting *Miranda*, *supra*, at 439).

Why is an error in determining voluntariness so much worse in one direction than the other that it justifies placing such a heavy thumb on the scales of justice? This is not a simple question, because the self-incrimination privilege embodies many values. See *Withrow* v. *Williams*, 507 U. S.

680, 691-692 (1993). Certainly one of the most important, though, is the danger that a coerced confession, erroneously determined to be voluntary, can result in the conviction of an innocent person.

> "Nor does the Fifth Amendment 'trial right' protected by *Miranda* serve some value necessarily divorced from the correct ascertainment of guilt. ' "[A] system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses" than a system relying on independent investigation.' *Michigan* v. *Tucker*, *supra*, at 448, n. 23 (quoting *Escobedo* v. *Illinois*, 378 U. S. 478, 488-489 (1964)). By bracing against 'the possibility of unreliable statements in every instance of in-custody interrogation,' *Miranda* serves to guard against 'the use of unreliable statements at trial.' *Johnson* v. *New Jersey*, 384 U. S. 719, 730 (1966) . . . ." *Id.*, at 692.

Concern about the reliability of out-of-court confessions is similarly evident in the Treason Clause, which accepts only a "Confession in open Court" as a substitute for the two witnesses. U. S. Const., Art III, § 3.

> "It has been well remarked, that confessions are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable, in their nature, of being disproved by other negative evidence." J. Story, Commentaries on the Constitution of the United States § 943, pp. 671 (abridged ed. 1833) (reprint 1987).

Modern technology may be able to mitigate these concerns. Video recording of the entire interrogation, including both the questioner and the suspect, could be an effective alternative, such as the *Miranda* doctrine has contemplated from the beginning. See *Dickerson*, 530 U. S., at 440; P. Cassell, How Many Criminals Has *Miranda* Set Free?, Wall Street Journal,

Mar. 1, 1995, p. A17. Even without alternatives, however, the balance struck by *Miranda* must be reconsidered when a defendant seeks to apply the rule of exclusion to a situation where the danger of false evidence is not present. Where the adverse effects of erroneous admission of an involuntary confession are reduced, the adverse effects of erroneous exclusion of a voluntary confession have relatively more weight. See *infra*, at 17.

The second rationale implicit in the *Miranda* rule is the ability of the police to clarify the voluntariness issue by complying with the *Miranda* requirements. The passage quoted above puts the onus on the officers to "undertake to afford appropriate safeguards . . . ." The police are in control of the interrogation, and in most cases they know the *Miranda* requirements and are able to comply with them. While *Miranda* compliance does not guarantee that the interrogation will withstand a voluntariness challenge, the cases where it will not are "rare." *Dickerson*, 530 U. S., at 444 (quoting *Berkemer* v. *McCarty*, 468 U. S. 420, 433, n. 20 (1984)). This rationale loses some of its force in those situations where the *Miranda* line is not as bright as originally advertised. The *Withrow* Court acknowledged this problem when it referred to "*Miranda*'s bright-line (or, at least, brighter-line) rules . . . ." 507 U. S., at 694. Among these dim zones are the unresolved legal questions, such as the present case, see Part I, *supra*, and the perennially "slippery" definition of "custody." *Oregon* v. *Elstad*, 470 U. S. 298, 309 (1985); see also *Withrow*, *supra*, at 684-685 (state and federal courts disagreed on custody).

B. The High Price of Conclusive Presumptions.

The *Miranda* rule employs a particularly drastic measure to minimize the risk of an erroneously admitted involuntary confession. Justice Harlan called it "heavy-handed and one-sided." *Miranda*, 384 U. S., at 525 (dissent). *Miranda* creates a conclusive presumption that any in-custody statement taken without complying with its procedures is coerced. See *With-*

row, 507 U. S., at 712 (O'Connor, J., dissenting). Conclusive presumptions, also known as *per se* rules and bright-line rules, are rarely warranted when considered purely on their logical merits.

> " '*Per se* rules . . . require the Court to make broad generalizations . . . . Cases that do not fit the generalizations may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.' *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U. S. 36, 50, n. 16 (1977).
>
> "*Per se* rules should not be applied, however, in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Coleman* v. *Thompson*, 501 U. S. 722, 737 (1991).

If the *Miranda* presumption were evaluated on *Coleman*'s criterion, it would fail dramatically. "[P]atently *voluntary* statements taken in violation of *Miranda* must be excluded from the prosecution's case . . . ." *Elstad*, 470 U. S., at 307 (emphasis in original). As the *Miranda* Court implicitly recognized, there are many circumstances under which a suspect can give an unwarned, but still clearly voluntary custodial confession. In his dissent, Justice White made the point explicitly.

> "Although in the Court's view in-custody interrogation is inherently coercive, the Court says that the spontaneous product of the coercion of arrest and detention is still to be deemed voluntary. An accused, arrested on probable cause, may blurt out a confession which will be admissible despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his admission. Yet, under the Court's rule, if the police ask him a single question such as 'Do you

> have anything to say?' or 'Did you kill your wife?' his response, if there is one, has somehow been compelled, even if the accused has been clearly warned of his right to remain silent. Common sense informs us to the contrary." *Miranda*, 384 U. S., at 533-534 (White, J., dissenting).

Judge Henry Friendly's public response to *Miranda* underscored the practical soundness of Justice White's hypothesis. "[T]he books are full of instances, of which the Court must have been well aware through petitions for certiorari, where it is evident that in-custody interrogation did not represent the exercise of compulsion." H. Friendly, Benchmarks 272-273 (1967). Next, Judge Friendly lists four then-recent cases in which there was no question that the custodial interrogation produced a voluntary confession. See *id.*, at 273, nn. 33-36 (citing *United States* v. *Cone*, 354 F. 2d 119 (CA2 1965); *United States* v. *Indiviglio*, 352 F. 2d 276 (CA2 1965); *Evalt* v. *United States*, 359 F. 2d 53 (CA9 1966); *United States* v. *D'Allesandro*, 361 F. 2d 694, 698 (CA2 1966)). In the years since *Miranda*, this Court has often found confessions to be voluntary even though they were taken contrary to the *Miranda* procedures. See, *e.g.*, *Elstad*, 470 U. S., at 312; *Oregon* v. *Hass*, 420 U. S. 714, 722 (1975); *Michigan* v. *Tucker*, 417 U. S. 433, 449 (1974); *Harris* v. *New York*, 401 U. S. 222, 224 (1971).

The downside of any conclusive presumption is that it disables the party disadvantaged by it from proving that the underlying, presumed fact is not true, regardless of how compelling a case he may have to disprove that "fact." Such presumptions are so inherently unfair that this Court has completely banned their use against defendants in criminal cases. See *Carella* v. *California*, 491 U. S. 263, 265 (1989) (*per curiam*). Yet *Miranda* construed the Constitution to require the same kind of presumption that *Carella* and *Sandstrom* v. *Montana*, 442 U. S. 510 (1979) construed it to prohibit.

"The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result." *Dickerson*, 530 U. S., at 444. This is no small disadvantage. For a murderer or rapist who could have been incapacitated to go back on the street and prey upon more victims is a horrific cost.

C. The Subtle Balance.

Whether the benefits of *Miranda* justify the costs even within the rule's core area of application was hotly debated in the *Miranda* decision itself, with dissenting Justices Harlan and White making a strong case that they do not. See also Cassell & Fowles, Handcuffing the Cops? A Thirty-Year Perspective on *Miranda*'s Harmful Effects on Law Enforcement, 50 Stan. L. Rev. 1055 (1998).

Moran v. *Burbine*, 475 U. S. 412, 426 (1986) referred to the "subtle balance struck in [the *Miranda*] decision." The cases since *Miranda* confirm that the costs and benefits are close to balance in *Miranda*'s core area. That is why proposals to extend the *Miranda* rule to areas where the costs are greater or the benefits are less have been largely rejected.

Harris v. *New York*, *supra*, is the first case in this line. Relying on a Fourth Amendment precedent, the Court permitted a statement taken without *Miranda* warnings to be used for impeachment. The additional deterrent effect of forbidding such use was not worth the additional cost of giving the defendant a license to commit perjury. See 401 U. S., at 225-226. *Michigan* v. *Tucker*, *supra*, similarly concluded that the marginal benefit of extending the *Miranda* exclusionary rule to a witness (Henderson) identified in the defendant's statement was not significant. The principal basis for this assessment was the fact that the manner of obtaining Tucker's statement had no bearing whatsoever on the reliability of Henderson's testimony. See 417 U. S., at 448-449. On the other side of the balance, as always, was "the strong interest under any system of justice of

making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." *Id.*, at 450. The reduced need for an exclusion sanction was insufficient to outweigh the need for reliable evidence in *Tucker*. See *id.*, at 451. *Oregon* v. *Hass*, *supra*, reaffirmed *Harris* on similar grounds. 420 U. S., at 722.

New York v. *Quarles*, 467 U. S. 649 (1984) made an exception to the *Miranda* rule for questioning needed to prevent further harm rather than merely to gather evidence of past harm. The exception is premised squarely on a weighing of the opposing dangers. "We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[4] *Id.*, at 657.

Berkemer v. *McCarty*, 468 U. S. 420, 437 (1984) declined to extend the *Miranda* warning requirement to traffic stops, even though they do come within *Miranda*'s description of custody—" 'otherwise deprived of his freedom of action in any significant way.' " *Id.*, at 435 (emphasis omitted). The atmosphere of compulsion is considerably less in such a stop, diminishing the need for warnings. See *id.*, at 437-439. *Illinois* v. *Perkins*, 496 U. S. 292 (1990) reached the same result for largely the same reason where the questioner is an undercover agent posing as a fellow prisoner. *Id.*, at 296-297.

The only area where *Miranda* has been expanded beyond its original boundaries is the issue of questioning for a different offense after invocation of rights, and even here the record is mixed. *Michigan* v. *Mosley*, 423 U. S. 96, 104-106 (1975) held that after an arrestee invokes his right to remain silent, it is

4. Justice O'Connor, concurring in part and dissenting in part, would have suppressed Quarles' statement as to where the gun was located, but not the gun itself, anticipating the question in the present case. See *id.*, at 669 (distinguishing "testimonial aspects of the accused's custodial communications" from nontestimonial aspects).

perfectly proper to approach him hours later, give new warnings, obtain a waiver, and ask questions about an unrelated offense. A contrary rule would increase the cost of *Miranda* safeguards and "transfer [them] into wholly irrational obstacles to legitimate police investigative activity . . . ." *Id.*, at 102. Yet the Court did exactly that in *Arizona* v. *Roberson*, 486 U. S. 675, 682-683 (1988), where the only difference was that the arrestee had asked to have a lawyer before answering questions rather than refusing to answer questions at all. See *id.*, at 678; but see *id.*, at 692-693 (Kennedy, J., dissenting) (similarity to *Mosley*).

Roberson was an anomaly the day it was decided, extending *Edwards* v. *Arizona*, 451 U. S. 477 (1981) to a situation where "[t]he problems to which *Edwards* was addressed are not present . . . in any substantial degree." *Id.*, at 693 (Kennedy, J., dissenting). It is even more anomalous since *McNeil* v. *Wisconsin*, 501 U. S. 171, 175 (1991) held, and *Texas* v. *Cobb*, 532 U. S. 162, 167 (2001) confirmed, that the analogous Sixth Amendment rule is "offense specific." In an appropriate case, *Roberson* should be reconsidered. For now, it is sufficient to note that the successive questioning cases are a singular exception to the rule. In all other areas, any variation from the core of *Miranda* that tips the balance in any degree against exclusion has resulted in the evidence being admitted.

D. Tucker, Elstad, and "Fruit."

This brings us back to the starting point—whether the present case can be meaningfully distinguished from *Tucker* and *Elstad*. In *Tucker* it was clear, and in the present case and *Elstad* it is assumed, that there was "a disregard, albeit an inadvertent disregard, of the procedural rules . . . established in *Miranda*. The question for decision is how sweeping the judicially imposed consequences of this disregard shall be." *Tucker*, 417 U. S., at 445.

Tucker rests on three premises. "Where the official action was pursued in complete good faith . . . the deterrence rationale

[for exclusion] loses much of its force." *Id.*, at 447. In *Tucker* the "violation" occurred before *Miranda*. See *ibid.* In the present case, it involved a question of law which is unsettled to this day. See Part I, *supra*. As noted, *supra*, at 17, the reliability of the evidence was not impaired in *Tucker*, as it is not in the present case. Finally, *Tucker* noted that the defendant's own statements were not being introduced in evidence, see *id.*, at 449-450, as they are not in this case. The weights on the two sides of the balance are exactly the same in this case as in *Tucker*.

Oregon v. *Elstad*, *supra*, rejected a "fruits" claim that was considerably stronger than the claim in the present case. As Justice Brennan noted in dissent, the psychological connection between an initial confession and a subsequent one is substantial, due to the "hopeless feeling of an accused that he has nothing to lose by repeating his confession, even when the circumstances that rendered his first confession illegal have been removed." 470 U. S., at 325.

The *Elstad* majority's rejection of the exclusion sanction is not based on any special status of subsequent confessions, because these are the most suspect of all "fruits." Instead, *Elstad* holds that "the *Miranda* presumption, though irrebuttable for purposes of the prosecutor's case in chief, does not require that the statements *and their fruits* be discarded as inherently tainted." *Id.*, at 307 (emphasis added). *Elstad* goes on to say that *Tucker*'s refusal to import the Fourth Amendment "fruit of the poisonous tree" doctrine into *Miranda* "applies with *equal* force when the alleged 'fruit' of a noncoercive *Miranda* violation is neither a witness nor an *article of evidence* but the accused's own voluntary testimony." *Id.*, at 308 (emphasis added). Equal means equal; equal does not mean greater. The Court of Appeals in the present case stressed that *Elstad* went on to quote a Fourth Amendment case drawing a distinction between objects and witnesses. See 304 F. 3d, at 1021. This reasoning makes too much of a make-weight argument in the *Elstad* opinion. The main reasons given for

admitting the "fruit" in *Elstad* are the absence of actual compulsion and the reliability of the evidence, factors which are at least as strong, if not stronger, when the "fruit" is physical evidence.

A case is controlling precedent for a later case if the two are the same in their material facts, and we look to the opinion to see which facts the court deemed material. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Grutter* v. *Bollinger*, No. 02-241, p. 7. The *Elstad* opinion does not deem it material which kind of "fruit" is involved; it considers them equal for this purpose.

Elstad is controlling precedent. The gun is admissible in evidence.

CONCLUSION

The decision of the Court of Appeals for the Tenth Circuit should be reversed.

July, 2003

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

(6)

Supreme Court, U.S.
FILED
JUL 14 2003
OFFICE OF THE CLERK

No. 02-1183

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SAMUEL FRANCIS PATANE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: FEB. 12, 2003
CERTIORARI GRANTED: APR. 21, 2003

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF COLORADO

No. 01-1503

UNITED STATES OF AMERICA, PLAINTIFF

v.

SAMUEL FRANCIS PATANE, DEFENDANT

DOCKET ENTRIES

DATE	PROCEEDINGS
10/31/01	[1460007] Criminal case docketed. Preliminary record filed.
	* * * * *
5/9/02	[1509436] Case argued.
	* * * * *
9/17/02	[1545634] Terminated on the Merits after Oral Hearing; Affirmed;
	* * * * *
10/31/02	[1559678] Petition for rehearing en banc [01-1503] filed by United States.
	* * * * *

DATE	PROCEEDINGS
11/25/02	[1566063] Appellee's response filed by Samuel Francis Patane to appellant's petition for rehearing in banc .
	* * * * *
12/9/02	[1569856] Order filed by Judges Ebel, Anderson and Henry denying Petition for rehearing in banc.
12/13/02	[1571310] Appellant's motion filed by Appellant United States to stay execution of the mandate until 3/10/03 pending petition for certiorari.
12/18/02	[1572403] Order filed by Judges Ebel, Anderson, and Henry granting appellant's motion to stay execution of the mandate until 3/10/03 [1571310-1].
	* * * * *

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF COLORADO

No. 01-CR -228-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

SAMUEL FRANCIS PATANE, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
6/8/01	1	COMPLAINT against Samuel Patane signed by Magistrate Judge Boyd N. Boland AUSA Suneeta Hazra
		* * * * *
6/19/01	6	INDICTMENT by USA Counts file against Samuel Franis Patane (1) count (s) 1 (pc)
6/20/01	8	COURTROOM MINUTES OF ARRAIGNMENT/DETENTION before Magistrate Judge O.E. Schlatter; NOT GUILTY plea entered
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
7/9/01	12	MOTION To Suppress (Evidence by) Samuel Franis Patane
7/17/01	13	RESPONSE by USA motion to Suppress Evidence
		* * * * *
10/3/01	28	COURTROOM MINUTES OF ORAL RULING before Judge Walker D. Miller; ORDER: GRANTING Motion to Suppress Evidence
		* * * * *
10/29/01	32	APPEAL Notice to C/A by USA from the Order suppressing evidence

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Criminal Case No. 01-CR-228

UNITED STATES OF AMERICA, PLAINTIFF

v.

SAMUEL PATANE, DEFENDANT

INDICTMENT
18 U.S.C. § 922 (g)(1)

The Grand Jury charges that:

COUNT ONE

On or about June 6, 2001, in the State and District of Colorado, the defendant, SAMUAL FRANCIS PATANE, having previously been convicted in the District (Court) of El Paso County, Colorado, in Case Number 98CR64 of Possession of Scheduled II Controlled Substance, a crime punishable by imprisonment for a term exceeding one year, did unlawfully and knowingly possess, in and affecting interstate commerce, a firearm to wit: a Glock Model 22, 40mm caliber pistol, bearing serial number RE377.

All in violation or Title 18, United States Code, Section 922(g)(1) and 924(a)(2).

A TRUE BILL:

/s/ ILLEGIBLE
FOREPERSON

RICHARD T SPRIGGS
United States Attorney

SUNEETA HAZRA
By: SUNEETA HAZRA
Assistant U.S. Attorney

DATE: May 17, 2001

DEFENDANT:	Samuel Patane
AGE:	
ADDRESS:	Colorado Springs, Colorado
OFFENSE:	Count I: 18 U.S.C. 922(g)(1) Possession of a firearm by a convicted felon.
LOCATION OF OFFENSE:	Denver, Colorado
PENALTY:	Count I: NMT 10 years imprisonment; $250,000 fine, or both; NMT 3 years supervised release, $100.00 Special Assessment Fee
AGENT:	Richard Marianos Assistant U.S. Attorney
AUTHORIZED BY:	Suneeta Hazra Assistant U.S. Attorney

ESTIMATED TIME OF TRIAL:

X___ five days or less

_____ over five days

THE GOVERNMENT

X____will seek detention in this case

_____ will not seek detention in this case

The Statutory presumption of detention is or is not applicable to this defendant.

OCDETF CASE: ___ Yes X____ No

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLORADO

Criminal Action No. 01-CR-228

UNITED STATES OF AMERICA, PLAINTIFF

v.

SAMUEL PATANE, DEFENDANT

REPORTER'S TRANSCRIPT
HEARING ON MOTIONS

Proceedings before the HONORABLE WALKER D. MILLER, Judge, United States District Court for the District of Colorado, commencing at 2:00 p.m., on the 27th day of September, 2001, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

Sunseeta Hazra, Assistant United States Attorney, 1225 17th Street, Suite 700, Denver, Colorado 80202, appearing on behalf of Plaintiff.

Virginia Grady, Federal Public Defender, 1099 18th Street, Suite 300, Denver, Colorado 80202, appearing on behalf of Defendant.

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Janet Morrissey, 1929 Stout Street, Room C-109, Denver, Colorado, 80294, (303) 893-2835

[2]

PROCEEDINGS

THE COURT: We are here on Case No. 01-CR-228, United States of America versus Samuel Patane, I guess is it. Is that the right pronunciation?

MS. GRADY: It looks like it would be, but actuallyit's pronounced Patane.

THE COURT: Patane?

MS. GRADY: Patane, correct. I am sure I will mispronounce it for the entire hearing, but it's correctly pronounced Patane.

THE COURT: Counsel, enter your appearance.

MR. HAZRA: Sunseeta Hazra for the United States. With me is Richard Marianos from the ATF.

MS. GRADY: Virginia Grady along with Mr. Patane.

THE COURT: We are here for hearing on the defendant's motion. Does either side wish sequestration of witnesses?

MS. GRADY: We do, Your Honor, and we are requesting sequestration of witnesses.

MR. HAZRA: No opposition.

THE COURT: All right. Who are these people in the courtroom? Need they be sequestered?

MR. HAZRA: None of them are testifying, Your Honor.

THE COURT: Do we have an order out?

THE COURT DEPUTY: Yes, Your Honor. It's on the door.

THE COURT: All right. This concerns evidence that

[3]

the government would sponsor. Is the government prepared to put on testimony in support of this evidence?

MR. HAZRA: Yes, Your Honor.

THE COURT: Please proceed.

MR. HAZRA: First, Your Honor, I think you should know that defense counsel and I stipulated to exhibits that are in front of you. We would call Officer Tracy Fox.

THE COURT: The Exhibits A through J are stipulated?

MS. HAZRA: Yes, Your Honor.

THE COURT: All right. Exhibits A through J are admitted.

(Tracy Lynn Fox was sworn.)

THE WITNESS: I do.

THE COURT DEPUTY: Please state your full name and spell your last name for the record.

THE WITNESS: Full name is Tracy Lynn Fox, F-O-X.

DIRECT EXAMINATION

BY MS. HAZRA:

Q. Good afternoon, Officer Fox. Where are you employed?

A. City of Colorado Springs as a police officer in Colorado Springs.

Q. How long have you been so employed?

A. Approximately a year and a half, a little bit over.

Q. In that capacity did there come a time when you needed to investigate a complaint complaining that Samuel Patane had [4] violated a temporary restraining order?

A. Yes.

Q. How did you first hear about this complaint?

A. I was called, dispatched as a call for service by the victim.

Q. Who is the victim?

A. Linda O'Donnell.

Q. What happened when you received the dispatch call? Where did you go?

A. I went to her residence. I can't remember the exact address. And I responded to her house and she was there, and she explained to me what happened.

Q. And what did she tell you happened?

A. She told me that Mr. Patane had been previously picked up on a charge of domestic violence and she had a restraining order against him at the time. And he had called her and violated that restraining order.

Q. Who was she in relation to the defendant?

A. They were ex-girlfriend and boyfriend.

Q. And was she the subject of this restraining order?

A. Yes.

Q. And how long was the temporary restraining order in effect?

A. It was in effect for 72 hours after he is let out of jail.

Q. During this time is when you received this complaint?

A. Correct.

[5]

Q. What did she tell you happened?

A. She said that she had gotten a phone call, and when she answered the phone the person hung up. She did a star 57 and then a star 69, and she recognized the phone number as that of Mr. Patane's.

Q. How did that violate the restraining order, that conduct?

A. He is instructed by the Judge when he is let out of jail to have no contact whatsoever with the victim, either by phone, indirectly or directly.

Q. I would like you to look at Exhibit B in the black notebook in front of you. It's white, sorry. It's a front and back. What is this document?

A. This is the actual domestic violence summons that I completed.

Q. What day did you complete this?

A. On the 6th—6th of June.

Q. When did you complete this in relation to your conversation with Ms. O'Donnell?

A. Immediately while I was there, I completed it after she had completed her statement.

Q. What is the second page, Probable Cause Affidavit? What is that?

A. That is my probable cause to believe that he violated the restraining order, which is what I have notarized and then placed him into jail with.

[6]

Q. If you would look at Exhibit A, please, what is that document?

A. This is the statement that the victim, Linda O'Donnell, filled out and signed.

Q. When did she fill that out?

A. While I was there on the 6th of June.

Q. What is Colorado Springs Police Department policy in domestic violence cases?

A. We take the statement. We complete the summons. And we immediately attempt to contact the suspect to place him under arrest.

Q. When you say, "We complete the summons," that's the document Exhibit B?

A. Correct.

Q. Why did you immediately attempt to place the suspect under arrest?

A. Because they are—that is policy. And they are normally, as in this case was, they were

afraid for their safety or their life.

Q. What else did Ms. O'Donnell tell you concerning that?

A. With regard to being afraid for her safety or life?

Q. Yes.

A. She said that she knew that Mr. Patane had purchased a gun because she went to a gun show with him and that he purchased it there with her, and that he presently had it on him. And [7] she also mentioned that he had a list of other people that he wanted to kill

and that she was afraid that he was going to come back and kill her as well.

Q. So based on this conversation with Ms. O'Donnell and filling out the summons, what did you do?

A. She told me that he worked at Phil Long Ford until, I believe it was, approximately 5:00 o'clock, and so I attempted to go to Phil Long Ford. Before I got there I found out he was not at work, so I went over to his residence.

Q. Where is his residence?

A. His residence is 837 East Vermijo.

Q. Is that in Colorado Springs?

A. In Colorado Springs.

Q. Who was with you at the time you went there?

A. I went with Officer Mulso. Officer Mulso met me there and Josh Benner got in my vehicle as well.

Q. Who is Josh Benner?

A. He is an officer with the Colorado Springs Police Department temporarily with ATF.

Q. Was this the same day that you went over to the house?

A. Yes, it is.

Q. What happened when you got to the house?

A. I knocked—myself and Officer Mulso were at the front door, and I knocked — and Officer Benner went to the rear of the residence in case Mr. Patane attempted to run. And Officer [8] Mulso and I knocked on the door. A female came to the door.

Q. What were you wearing at the time?

A. I was wearing my uniform, police uniform.

Q. What was Officer Mulso wearing?

A. His police uniform.

Q. Please continue. What happened when the woman came to the door?

A. I asked if Mr. Patane was there, and she said that he was. And she went to get him and he came out to the door.

Q. What happened when he got to the door?

A. We asked him to step outside because we wanted to talk to him about this incident. And I asked him what happened, and he said—he denied having made the phone call. And I told him that he was under arrest and I asked him if he had his ID and if he would like to get his shoes on.

Q. Do you see Mr. Patane in the courtroom today?

A. Yes, I do.

Q. Could you please identify him by where he is sitting and what he is wearing?

A. This gentleman right here with the maroon shirt and black pants.

MS. HAZRA: Could the record reflect the witness has identified the defendant?

THE COURT: It so reflects.

Q.Where were you when you placed him under arrest?

[9]

A. On the porch, the front porch.

Q. Could you please look at—I think it's marked Exhibit F in the notebook. What is that a picture of?

A. That's the—that's Patane's—the front of his house.

Q. Is that the area where you placed him under arrest?

A. Yes. You see the dark area right up there which is a cement porch, that's right below the door right there.

Q. What happened after that?

A. Mr. Patane started to go back into his bedroom to get his ID and his shoes, and I followed him in along with Officer Mulso. And in Mr. Patane's bedroom he started crying and yelling and saying things weren't fair and that we were ruining his life.

And he started basically to freak out, and so for our safety we put him into handcuffs right there in the bedroom. He told me where his ID was and we—I got the ID out. And he refused to put his shoes on so for our safety we went ahead and took him back outside without his shoes.

Q. And at some point in time did Detective Benner come up?

A. When we were up on the grass, we had taken him off the porch already and were starting to walk him into the yard, that's when I called for Officer Benner to come up to the front of the house if he wanted to talk to Mr. Patane.

Q. And after Detective Benner was done with all his conversations with the defendant, what did you end up doing [10] with the defendant?

A. I placed him in the back of my police cruiser, and I brought him into jail and booked him into jail.

Q. What charge did you book him on?

A. Domestic violence, violation of restraining order.

Q. While you were inside the house with the defendant getting his shoes, did you ask him permission to search his house at all?

A. No, I didn't.

Q. Did you seize anything from the house?

A. No, I didn't.

Q. And how did you let the defendant know he was under arrest when he was outside on the porch?

A. I told him he was under arrest for domestic violence, violation of restraining order.

MS. HAZRA: If I could have one moment, Your Honor. I have no further questions.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MS. GRADY:

Q. Officer Fox, what did you do before you were a police officer for Colorado Springs?

A. I was a systems analyst with Computer Technology Associates.

Q.At the time that—on the day you arrested Mr. Patane —[11] and I am going to call who you call Mr. Patane Mr. Patane so you know who we are talking about—the day you arrested Mr. Patane, how long had you been an officer with the Colorado Springs Police Department?

A. Just over a year.

Q. Now, are you telling us that it is the policy of the Colorado Springs Police Department for officers to enable themselves with probable cause to arrest and—

let me rephrase the question. You have told us that you filled out a statement of probable cause after you interviewed Ms. O'Donnell, correct?

A. After she completed her statement, correct.

Q. Are you telling us that the Colorado Springs Police Department teaches you that that's all you need to do before going out to arrest an individual?

A. No.

Q. Does the Colorado Springs Police Department teach you to verify a claim made by an individual when that individual makes that claim?

A. It puts—it empowers us with the ability to make a decision for ourselves to gather probable cause to make the arrest.

Q. All right. Well, let's talk about what it is that Ms. O'Donnell told you on the 6th of June. First of all, you were dispatched to her house by the main dispatcher office?

A. Correct.

[12]

Q. So does that mean that Ms. O'Donnell made a 911 call to the Colorado Springs Police Department?

A. She could possibly have called the non-emergency line.

Q. Do you have any idea how or who she called to—in order or what she did to have you dispatched to her home?

A. No, I don't.

Q. Did you ask her what she did to have you dispatched to her home?

A. No.

Q. When you interviewed Ms. O'Donnell, she was complaining to you about a telephone call that she received two days earlier, correct?

A. Correct.

Q. So the violation she claims occurred did not occur on the day you were dispatched to her home, did it?

A. Correct.

Q. What she told you was that a party called her house, correct?

A. She received a phone call, correct.

Q. And whoever it was who called her did not speak to her, correct?

A. Correct.

Q. And in fact, in her own handwritten statement which appears in Defendant's Exhibit A, she does not refer to the caller as Mr. Patane at all, does she?

[13]

A. No, she doesn't.

Q. You took this statement from her, correct?

A. Correct.

Q. She refers to the caller as the other party, doesn't she?

A. Yes.

Q. What she tells you is that she recognized the telephone number as that being the telephone number of Sam Patane, correct?

A. Correct.

Q. Did you call US West or whatever telephone company services Colorado Springs to verify the person who subscribed to that number?

A. No, I didn't.

Q. So at the time that you arrested Mr. Patane, did you have any idea who, if anyone, that telephone number was subscribed to?

A. I based it on her belief that it was Mr. Patane's telephone number.

Q. So your answer is no, you did not have any other information to verify who subscribed to the telephone number listed in Defendant's Exhibit A?

A. Correct.

Q. And I take it that from time to time you have been trained that the police department can call upon US West telephone security for information about subscriber information, correct?

[14]

A. Correct.

Q. But you did not take advantage of that opportunity on this day?

A. No, I didn't.

Q. Was this a—was the 6th of June a workday?

A. Yes.

Q. And when you were at Ms. O'Donnell's home, had it yet reached 5:00 o'clock in the afternoon?

A. It was my workday. I don't know if it was a weekday.

Q. Would it be safe to say it was a Monday or a Tuesday?

A. I don't know.

Q. Do you have any idea who—or at the time that you arrested Mr. Patane, did you have any idea who, if anyone, would have had access to the telephone number listed in Defendant's Exhibit A by Ms. O'Donnell?

A. No.

Q. So at the time that you arrested Mr. Patane, based on Ms. O'Donnell's claim, you could not say who, if anyone, had called Ms. O'Donnell between the dates of June 3rd and June 6th, correct?

A. Correct.

Q. Did you, prior to your arrest, traveling to arrest Mr. Patane, obtain a photograph of him?

A. No, I didn't.

Q. Would that explain why it was that Mr. Patane was required [15] to go get his identification at the time that you got to his house?

A. No, ma'am. We give them the opportunity to provide the identification card. We have also made arrests without the identification card.

Q. Did you ask Mr. Patane at the time he came to the door whether he was, in fact, Sam Patane?

A. Yes, ma'am, I did.

Q. And are you trained to verify that the person you are arrested is the person that you intend to arrest?

A. Definitely.

Q. And would that then explain why it is that Mr. Patane was going to get his identification?

A. He was getting his identification because I asked him if he had any ID.

Q. And having asked him if he had identification, he then turned to go back in the house, correct?

A. Correct.

Q. And you on your own accord followed him, did you not?

A. Correct.

Q. At this point in time what you are telling us is you had told Mr. Patane he was under arrest or that you were going to arrest him, correct?

A. That he was under arrest, correct.

Q. But you had not actually put handcuffs on him?

[16]

A. That's correct, but he was still under arrest.

Q. And being under arrest, you then of your own accord and without invitation from Mr. Patane followed him back into his house, correct?

A. He was in my custody and control at that time, yes.

Q. It is at the point—and Mr. Patane's identification is somewhere in his bedroom, is it not?

A. Correct.

Q. There was a photograph of Mr. Patane's bedroom in Defendant's Exhibit J. Is that photograph of his bedroom?

A. It could be. The bed was in a different position and I don't know where the—the items in the bedroom were, but the bed was turned up against the wall.

Q. Other than the position of the bed in the room, was that the room where you followed Mr. Patane to get his identification?

A. I don't recognize the bedding.

Q. Do you recognize the room?

A. It could be any room. No, I don't recognize it as what I saw when I went there that day.

Q. Didn't we just show you this photograph 20 minutes ago before Judge Miller came out?

A. Yes, you did.

Q. Did you tell either me or Ms. Hazra you didn't recognize this photograph?

[17]

A. No. I heard you say that it was his bedroom and the bed was in a different position, but—

Q. Do you dispute this, that this is his bedroom?

A. No.

Q. Was there any other room you followed Mr. Patane to after you followed him into the house?

A. No. I just went through the living room right into his bedroom.

Q. Let's back up to Defendant's Exhibit I. Is that the front—I am sorry. Are you there?

A. Yes.

Q. Is Defendant's Exhibit I a picture of the front door of Mr. Patane's home?

A. Yes.

Q Does that photograph look familiar to you?

A. Not in particular.

Q. Do you remember the events of this day independent of—other than your report?

A. Yes, I do.

Q. You were asked to look at this photograph before we started court as well, correct?

A. Correct.

Q. How about Defendant's Exhibit H, does that look familiar to you as a place you had been before?

A. It looks the same as I, except some things are a little [18] different.

Q. Does that appear to be the front door of Mr. Patane's house?

A. Yes.

Q. And do you recall—and please feel free to use the photograph to refresh your recollection—whether the front door opens out to the front porch?

A. It shows that it opens out.

Q. Now, please turn to Defendant's Exhibit G. Is that the living room of Mr. Patane's home?

A. Yes, it is.

Q. Mr. Patane rents a room in this house, does he not?

A. He lives there is all I know.

Q. Prior to arresting Mr. Patane, did you do anything to determine whether, in fact, he does live there?

A. That is the address that was on his identification card.

Q. Well, but of course you got that after you arrested him, didn't you?

A. I had his date of birth before when I got it from Linda O'Donnell, and I ran him on the computer system. So I can get all his information from the computer system.

Q. Did the computer system give you this particular address?

A. Yes, it did.

Q. What computer system is that?

A. That's the computer system that's in my cruiser. That is [19] linked back to his driver's license.

Q. All right. When is it that you accessed this computer system?

A. When I made sure that there was an actual restraining order against him from Linda O'Donnell.

Q. Did you—let's talk about this restraining order. The restraining order was a temporary restraining order, correct?

A. Correct.

Q. It was a restraining order issued as a temporary condition of bond following his release from jail on June the 3rd, 2001, was it not?

A. Correct.

Q. Did you actually read the restraining order before you went to arrest Mr. Patane?

A. I believe I did. She had a copy of it there with her. And when you run it on the computer, it does come up on the computer system as well to verify.

Q. Did you take it with you when you went to arrest Mr. Patane?

A. No, I did not.

Q. Can you tell us today what the exact words of the no-contact order on the restraining order are?

A. No, I cannot.

Q. When you—getting back to Defendant's Exhibit G, when you enter the house, you have to walk through this living room to [20] get to the bedroom where Mr. Patane kept his identification card, correct?

A. Yes, ma'am.

Q. Are you familiar with the service that star—pushing the numbers star 57 on a telephone provides?

A. Yes.

Q. What does that service provide?

A. It serves as a documentation of the phone call that had just been placed.

Q. What kind of documentation?

A. I don't know what correct terminology there is.

Q. Well, Ms. O'Donnell told you that she pushed star 57 and then she pushed star 69, correct?

A. Star 57 actually shows a documentation of where—of the phone call that was made.

Q. Did you—

A And that's with the telephone company. Star 69 shows the phone call, tells the caller who made the phone call.

Q. Do you know whether one of these two numbers actually traces the call that was made?

A. Star 57.

Q. All right. And did you make any effort at all to see whether there was, in fact, a record of this particular

call being made from the number provided by Ms. O'Donnell?

A. No, I didn't.

[21]

Q. Had you ever done that?

A. Yes, I have.

Q. And what did you find out?

A. A telephone number of a person who made a bomb scare.

Q. I am sorry?

A. You asked if I ever—

Q. I am asking you in this particular case did you contact US West to verify whether, in fact, a telephone call had been made and traced?

A. No, I did not.

Q. You have never done that?

A. Not in this case, no.

Q. Other than your conversation with Ms. O'Donnell, did you receive any other information to verify the complaint that Ms. O'Donnell was making against Mr. Patane?

A. No, ma'am.

Q. Did Ms. O'Donnell tell you—you have talked to us about claims or accusations Ms. O'Donnell made regarding a gun, correct?

A. Yes.

Q. Ms. O'Donnell told you that she was with Mr. Patane when the gun was purchased, correct?

A. Correct.

Q. Did Ms. O'Donnell mention to you that at that time she was on bond for a case out of the State of Wisconsin?

[22]

A. No.

Q. Are you aware that at the time Ms. O'Donnell was on bond for a case out of Wisconsin?

A. I am aware now.

Q. Would you please look at the exhibits that are marked as Defendant's Exhibit D.

A. Okay.

Q. Is Defendant's Exhibit D a reflection or a copy of the court documents pertaining to the case filed against Linda S. O'Donnell in the State of Wisconsin?

A. It appears to be.

Q. And was it, at the time that you interviewed Ms. O'Donnell, conditioned upon that she not possess a weapon herself?

A. Correct.

Q. Did she make any reference to this problem she had at the time that you interviewed her?

A. No.

Q. And prior to your arresting Mr. Patane, did you run a criminal records check on the NCIC, National Crime Information Center computer?

A. No.

Q. So at the time that you arrested Mr. Patane, you had done nothing to verify the reliability of the

information that Ms. O'Donnell provided to you, had you?

A. That's correct.

[23]

Q. Did Ms. O'Donnell tell you when exactly it was that she had last seen this firearm she described?

A. No.

Q. Did Ms. O'Donnell tell you when it was that she had last seen Mr. Patane?

A. No.

Q. Are you the person who arrested Mr. Patane?

A. Yes.

Q. Was Officer Benner with you when you arrested Mr. Patane?

A. No.

Q. Was Officer Benner, was he still someplace behind the house to make sure Mr. Patane wouldn't escape out the back door?

A. Correct.

Q. How long after you arrested Mr. Patane in his bedroom did you—or you said his home, wherever you want to say you arrested him, how long was it that Officer Benner came around to converse with you?

A. Approximately five minutes.

Q. And at that point in time you had already had conversation with Mr. Patane, correct?

A. Conversation? I placed him under arrest.

Q. You told him what you were there for, didn't you?

A. Yes.

Q. You told him you were there because Linda O'Donnell had claimed he had violated the restraining order, correct?

[24]

A. Yes.

Q. And he told you that was not true, didn't he?

A. Yes.

Q. Did you, prior to telling him what he was under arrest for and why you were there, advise him of his *Miranda* rights?

A. No, I didn't.

Q. At any time during your contact with Mr. Patane did you advise him of his *Miranda* rights?

A. No, I didn't.

Q. And when you escorted him into the bedroom, I understand you say he became very upset and started to cry.

A. Yes.

Q. Were you present when Officer Benner questioned Mr. Patane about a gun?

A. Outside, yes.

Q. That was after you had put the handcuffs on Mr. Patane and taken him back outside?

A. Correct.

Q. What Officer Benner did was he told Mr. Patane, in addition to arresting him for violating the restraining order, that he wanted to know where the gun was, correct?

A. He read him his rights because he was going to ask him some questions.

Q. All right. Did Officer Benner get through the process of reading Mr. Patane his rights?

[25]

A. No.

Q. How far along did he get?

A. I believe the first sentence, because Mr. Patane said that he knew his rights.

Q. And Officer Benner quit reading the *Miranda* rights after that, didn't he?

A. And he asked him, "So you know your *Miranda* rights," and Mr. Patane said, "Yes, I do."

Q. Following that initial conversation, Officer Benner then began to question Mr. Patane about the whereabouts of the gun, didn't he?

A. Yes.

Q. And Officer Benner told Mr. Patane that it would in so many words assist him and assist his problem if he went and got the gun for Officer Benner, didn't he?

A. No.

Q. Didn't he tell—didn't Officer Benner tell Mr. Patane, "If you want to put yourself in front of this domestic violence situation, go and get the gun"?

A. No.

Q. The words "get yourself in front of the domestic violence situation" never came out of Officer Benner's mouth?

A. He said, "Get yourself in front of the situation." He didn't say, "If you want to get yourself in front of the situation."

[26]

Q. Tell me exactly what he said using those words.

A. I can't tell you exactly what he said, but he didn't ask him and he didn't give him any favors or offers in my case. My case was separate from what Josh Benner was there for.

Q. So Josh Benner wasn't there to arrest him for violation of a restraining order at all, was he?

A. Correct.

Q. He was there to basically seize a firearm, correct?

A. Talk to him about where the gun was.

Q. Is that right, Officer Benner—I am not sure I am using the correct title for him, but Detective Benner went to Mr. Patane's house in order to investigate his possession of a firearm, correct?

A. Correct.

Q. And to seize that firearm, correct?

A. I am not sure about the seize.

Q. Was there a discussion prior to arresting Mr. Patane about which one of you was going to go to the front door and who was going to go around back?

A. I told Officer Mulso that he was coming to the front and Josh would go to the back.

Q. When you were arresting—when you followed Mr. Patane into his house, did Officer—Mulso, is that?

A. Mulso, yes.

Q. Did he follow Mr. Patane into the house, too?

[27]

A. Yes.

Q. Did Officer Benner ever come into the house?

A. Not at that point.

Q. Well, did there come a point in time when Officer Benner did go into the house?

A. After Mr. Patane told him where the gun was and that he could go get it.

Q. And when Mr. Patane told Officer Benner where the gun was, this was after a series of questions involving the gun and where it was, correct?

A. Yes.

Q. So let me just make sure I am clear. You arrested Mr. Patane for a crime you did not observe, correct?

A. Correct.

Q. And a crime that you had not corroborated in any way, correct?

A. Correct.

Q. And you arrested him outside of his home and inside of his home, correct?

A. No.

Q. You arrested him outside of his home and then moved him inside—and then go ahead. You tell me in your words.

A. I arrested him outside, gave him the opportunity to get his shoes and his ID.

Q.And you followed him into his house without any invitation [28] by him, correct?

A. He was already under arrest and control, under my control.

Q. So your answer is yes, you did follow him into the house without any invitation by Mr. Patane?

A. Sure.

MS. GRADY: Thank you. I don't have any other questions.

THE COURT: Redirect?

MS. HAZRA: Just one minute, Your Honor.

REDIRECT EXAMINATION

BY MS. HAZRA:

Q. Officer Fox, did you ask the defendant any questions after you had him under arrest?

A. No, ma'am.

Q. You didn't seek to interview him in any way?

A. No, ma'am.

Q. I just want to turn again to Exhibit B, is it? Could you look briefly at it?

A. Yes.

Q. When you take this down, what is on the back page? What is that bottom box? You are swearing that it's true or—

A. That's correct. I am notarizing, swearing that it's true, that what I stated is true.

Q. And what is this document?

A. This is the Probable Cause Affidavit to place him under [29] arrest.

MS. HAZRA: Thank you. I have no further questions, Your Honor.

MS. GRADY: No, I have no questions.

THE COURT: May this witness be excused?

MS. HAZRA: Yes, Your Honor.

MS. GRADY: Yes.

THE COURT: You are excused. Thank you for your testimony.

MS. HAZRA: Detective Josh Benner.

(Josh Benner was sworn.)

THE WITNESS: I do.

THE COURT DEPUTY: Please state your full name and spell your last name for the record.

THE WITNESS: My name is Detective Benner, Josh Benner; last name, B-E-N-N-E-R.

DIRECT EXAMINATION

BY MS. HAZRA:

Q. Good afternoon, Detective Benner. Where are you employed?

A. I am employed with the Colorado Springs Police Department.

Q. How long have you been there?

A. About four and a half years now.

Q. What is your current assignment?

A. I am assigned with the Bureau of Alcohol, Tobacco & Firearms/Colorado Springs Police Department gun interdiction [30] unit.

Q. What are your responsibilities in that capacity?

A. To investigate all gun and narcotic, federal gun and narcotic investigations.

Q. Do you work primarily with ATF agents?

A. Yes, ma'am, I do.

Q. In that capacity as working with the ATF agents, did you become involved in an investigation of a Samuel Patane?

A. I did.

Q. Do you see him in the courtroom today?

A. Yes, ma'am, I do.

Q. Can you please identify him by where he is sitting and article of clothing?

A. He is sitting right next to defense counsel with a red shirt on.

MS. HAZRA: Could the record reflect the witness has identified the defendant?

THE COURT: So reflects.

Q. When did you first hear about the defendant?

A. ATF Agent in Charge Rich Marianos contacted me, stated he was informed by probation, a probation officer, that a person by the name of Samuel Patane was a convicted felon and was in possession of a firearm.

Q. Did Case Agent in Charge Marianos get any other information from the probation officer?

[31]

A. He stated that probation officer had him on his current probation list, and there might be a temporary

restraining order involved and another domestic violence complaint involved in the process.

Q. Did they give you any names of victims or anyone else involved?

A. Yes. The victim was Linda O'Donnell, in which ATF Resident in Charge Marianos gave me her phone number.

Q. After probation told Rich Marianos that he might have a gun, he told you the substance of this information?

A. Correct. He gave me the information and asked me to contact O'Donnell and reference that firearm.

Q. What was your—

A. Just to verify the information the ATF had given ATF Agent Marianos and just more information about the gun and Samuel Patane.

Q. When did you go to contact Ms. O'Donnell?

A. Right after I was given the information, I contacted her by phone.

Q. Do you recall the date?

A. I believe June 6. I don't recall exactly the time.

Q. Of this year?

A. Yes, ma'am.

Q. When you called her on the phone, what did you talk to her about?

[32]

A talked to her about the gun, and she stated that she had been with him when he bought a 9-millimeter or a

.40 caliber Glock at a gun show a month prior in Colorado Springs.

Q. What else did she say concerning the gun?

A. She stated that he had carried it with him most of the time and that she believed he wasn't supposed to have a gun even though he never told her that, but because there was a domestic violence claim she pressed on him in September of 2000, I believe, he was not supposed to have a gun.

Q. Did she tell you he had ever shot it?

A. She stated she never witnessed him shooting it, but that he had told her that he had shot it.

Q. And at this time what did you know about the defendant's criminal history?

A. Just that from probation that he was a convicted felon and/or domestic violence conviction and that he was on probation at that time.

Q. So at that time did you know if he was prohibited under the federal law from possessing a firearm?

A. If he was convicted, yes, he was prohibited.

Q. Based on this information concerning the Glock pistol, what did you do?

A. I continued the investigation at that point. Ms. O'Donnell stated Officer Tracy Fox was there taking a violation of the restraining order. At that point I talked to her a little bit [33] and was informed he had worked at Phil Long Ford.

Q. Who is he?

A. Samuel Patane worked at Phil Long Ford down in Motor City at Colorado Springs. At that point I told

Resident Agent in Charge Rich Marianos about that and we responded to the Phil Long Ford.

Q. Was the defendant there when you got there?

A. No, he was not.

Q. Where did you go next?

A. At that point I contacted Officer Fox and again stated that we didn't have any contact with him. She stated she was going to go out to his house. And I asked her if I could meet her there and talk to Sam Patane at that point, and she stated yes.

Q. Who went with you to the house?

A. Myself, Officer Fox and another officer. I don't remember his name.

Q. Were you in uniform at the time?

A. No, ma'am. I was in plain clothes.

Q. Where did you go when you first got to the house?

A. I was instructed to go to the back in case Mr. Patane decided to run at any case, and so I went to the back of the residence. I believe it's 827 East Vermijo and while Officer Fox and the other officer went to the front.

Q. Did there come a time when you left the back of the house?

A. Yes, ma'am, after I heard voices and Tracy Fox stated [34] everything was okay and he was in the front, then I responded to the front of the residence.

Q. Approximately how long was that time period?

A. Five, six minutes, maybe.

Q. When you got to the front, where was everyone? Who was out there?

A. They were out in the yard near—there is a gate at the front of their yard and he was near to the gate and the house.

Q. Who was "he"?

A. I am sorry, Samuel Patane.

Q. Who else was out there?

A. Officer Fox and the other CSP officer.

Q. Was there anybody else out there?

A. There was another lady. I thought it was his mother or someone else related to him in the front of the doorway.

Q. When you got there, what was the defendant— was he in handcuffs?

A. Yes, he was.

Q. What did you first say to him?

A. I identified myself. I had my badge around my neck, stated I was with the ATF gun interdiction unit and I was there to talk to him. At that point I started to read him his rights. I said, "You have the right to remain silent." He stated, "I know my rights." I said, "You know your rights?" He said, "Yeah, I know my rights."

[35]

Q. How much of his rights did you read him?

A. I just said, "You have right to remain silent." He was very concerned about the domestic violence complaint.

Q. And after he stated that he knew his rights and you affirmed that, what did you do?

A. I just asked him—I was interested in the guns that he owned and he stated, "That .357 is already in police custody." I said, "I am more interested in the Glock."

Q. Let's go back. What is the .357?

A. It was another firearm that I found out later from Ms. O'Donnell that he had in his possession and involved in some kind of a automobile theft and was recovered by the police department, Colorado Springs Police Department.

Q. So after you said you mentioned the Glock. What did he say in response?

A. He said, "I am not sure I should tell you anything about the Glock because I don't want you to take it away from me."

Q. What did you say?

A. I said, "In order to be truthful about this whole matter—you have been truthful up to this point—I need to know about the Glock."

Q. What happened next?

A. He stated, "The Glock is in my bedroom on a shelf, on the wooden shelf."

Q. What did you—

[36]

A. I asked him if I could have permission to go get the Glock. He said, "Yes. Again, it's on the wooden shelf in my bedroom."

Q. What happened after you received permission to go in and get the firearm?

A. I went in. I believe the other lady followed in behind me. I went into his room. There is a gray case on

the second level of his wooden shelf behind some magazines. I opened it up, saw there was a Glock .40 in there. I turned to the lady, said, "Is there anything else in the room I should know about that you know about?" She said, "I didn't even know about the gun."

Q. How did you know where to find the gun again?

A. Sam Patane told me.

Q. You asked him if you could go get it?

A. Yes, ma'am.

Q. After you recovered the gun, what did you do?

A. Brought the gun out to him to show he had the gun. I asked him, "Have you ever used this in a crime?" He stated, "No." I said, "Has Linda O'Donnell ever shot this gun?" He said, "No." I asked him if he shot it. He said, "Yeah, a couple times. "I asked him where he got it. He said from a gun show about a month earlier.

Q. And then what happened?

A. At that point I told him I wasn't going to arrest him for the gun at this point because I wanted to do some more investigations. I believe Officer Fox was going to have to [37] arrest him for—or take him down to the Criminal Justice Center because of the violation of the restraining order.

Q. Did you at any point in time threaten the defendant?

A. No, ma'am.

Q. Did you—were you armed at the time?

A. Yes, ma'am. I was in plain clothes, but I had my sidearm to my side.

Q. Did you ever pull out your weapon?

A. No, ma'am.

Q. Did you ever hit the defendant?

A. No, ma'am.

Q. Did you ever promise him anything?

A. No, ma'am.

Q. Did the woman who accompanied you inside the house, did she object to you going in the house?

A. No. She just followed me, behind me.

MS. HAZRA: If I could have one moment. I have nothing further.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MS. GRADY:

Q. Detective, you didn't know who that woman was, did you?

A. No, ma'am, I did not.

Q. And you hadn't made any arrangements prior to going to Mr. Patane's house to find out who you might find there, had [38] you?

A. No, ma'am.

Q. So you didn't even ask this woman if it was all right to go into the house, did you?

A. No, ma'am, I did not.

Q. Let's talk about the information that you received from Special Agent Marianos.

A. Sure.

Q. Special Agent Marianos told you he received a telephone call from a probation officer?

A. Yes.

Q. At the time that you arrested Mr. Patane, did you know what jurisdiction this probation officer worked in?

A. El Paso County.

Q. At the time you arrested Mr. Patane, you knew that?

A. I just assumed it because probation calls us all the time.

Q. That's not my question. My question is at the time that you arrested Mr. Patane, did you, in fact, know what jurisdiction this probation officer worked in?

A. I did not arrest him at the time.

Q. Well, let me rephrase the question. At the time that you went to Mr. Patane's house and had contact with him, did you actually know what jurisdiction this probation officer worked in?

A. No, ma'am.

[39]

Q. Did you know at the time that you went to Mr. Patane's house whether, in fact, this probation officer was reporting an observation that he or she made personally?

A. Whether she saw the gun; is that correct?

Q. Correct.

A. No, ma'am.

Q. So to the extent that this information was relayed by a probation officer somewhere to Special Agent Marianos, you had no idea how it was that probation

officer came to have this particular information, did you?

A. Correct.

Q. You did write a report summarizing the events of that day, did you not?

A. Yes, ma'am.

Q. And did you write that report based upon your conversations with the other people who were present during the arrest of Mr. Patane?

A. I wrote about those incidents, that's correct.

Q. In fact, you were actually not present at the point Mr. Patane was arrested, were you?

A. No, ma'am. I was in the back.

Q. But in your report, which it appears as Defendant's Exhibit C, if you would like to turn to the notebook, you describe in some detail the events of the arrest of Mr. Patane, do you not?

A. I just stated that he was arrested by Officer Fox, I [40] believe.

Q. Well, please—your report is three pages long, isn't it?

A. Yes, ma'am.

Q. Please turn to Page 2 of your report.

A. Okay.

Q. In your report, the bottom paragraph of Page 2, you wrote, Officer "Fox was able to place Patane under arrest without incident inside the home of Patane," correct?

A. Correct. I did write that.

Q. Now, I take it that that was based upon information that Officer Fox supplied to you, correct?

A. When I came out he was under arrest, so I assumed that everything was okay because she said everything was okay, that he was arrested under the domestic violence, yes.

Q. So your answer is yes, that was based on information that she supplied to you?

A. Sure. When I came out he was arrested, in handcuffs, so I assumed he was arrested. There was no fight. There was no incident, I guess is what I am trying to say.

Q. All right. Well, this is a report that you had reviewed by your supervisor, Sergeant Reisler, is it not?

A. Correct.

Q. You are trained not to write and report assumptions and guesses, are you not?

A. Correct.

[41]

Q. So you did not have actual conversation with Mr. Patane until he was in a pair of handcuffs?

A. Yes, ma'am, that's correct.

Q. And at that time you began to read him his *Miranda* rights?

A. Correct.

Q. But it is fair to say that you did not read him his *Miranda* rights, correct?

A. He stated he knew his rights. I asked him again, "Do you know your rights?" He answered, "Yes."

Q. Of course you didn't know at that time how or in what context Mr. Patane might think he knew what his rights were, did you?

A. When somebody tells me he knows his rights, I believe him. I said, "You have the right to remain silent." He said, "I know my rights." I said, "You know your rights?" He said, "I know my rights."

Q. Was there some emergency going on at that point in time, Detective Benner?

A. I don't understand what you mean by emergency.

Q. Was there something going on that prevented you from saying to Mr. Patane, "I understand, pal, but I am going to read you your rights anyway"?

A. No, ma'am. He was acting very upset. I was trying to calm him down. I just said, "I need to talk to you about the gun." It was very—I was just trying to get him to calm down [42] because once outside the home he was very upset.

Q. So because he was very upset, you did not insist on reading him his rights?

A. Once he said he knew his rights, I did not.

Q. I take it he remained very upset while you began to question him about a crime more serious than a violation of a restraining order?

A. He was up and down. At first he was very upset, then I would calm him down, ask him some questions. He would get more upset about the domestic violence complaint. I told him I didn't have a lot to do with the domestic violence complaint. I was here to talk to him about the gun. So he was up and down as far as being upset.

Q. You continued to talk to him whether he was up or whether he was down?

A. Yes, ma'am.

Q. And when he was up and down, I take it you are talking about his objective demeanor?

A. Yes, ma'am.

Q. While he was up and down you told him that you were there to look for a 9-millimeter gun?

A. I told him I was there to discuss a 9-millimeter or .40 Glock.

Q. And what you told him—and if you would like to refresh your memory by turning to Page 3 of your written report—was [43] that he was being cooperative to this point. Those are words in your report, correct?

A. Yes, I did tell him that.

Q. Referring you to the top paragraph of your report—

A. I have it.

Q. —on Page 3. And your words were, quote, "And to get in front of the domestic violence case, he needed to be truthful regarding the location of his firearm"?

A. Correct.

Q. Well, now, I thought you just told us you weren't there to investigate a domestic violence.

A. I wasn't. I just wanted him to be truthful about everything.

Q. That is, in fact, what you told him?

A. Correct.

Q. When you say "get in front of a domestic domestic violence case," are you suggesting to him he would be helping himself regarding that particular charge by identifying the location of the gun?

A. No, ma'am. I was just explaining to him he needed to be truthful about everything, the domestic violence, the gun, whatever else. That's all I was asking him.

Q. Please explain to us what the words "get in front of the domestic violence case" means?

A. Just to be truthful about everything, to include the [44] domestic violence case, to include the Glock .40.

Q. Did you explain to Mr. Patane what you meant by the phrase "get in front of the domestic violence case"?

A. No, ma'am, because at that point he just started to talk to me about it.

Q. Well, he didn't actually start to talk to you about it at that point, did he?

A. He told me where the gun was.

Q. He told you about a .357, didn't he?

A. Correct. And I said I was more interested in the .40 or the Glock.

Q. I would like to back you up to your conversation with O'Donnell.

A. Sure.

Q. Did you actually, prior to going to Mr. Patane's house on the 6th of June, did you actually meet Ms. O'Donnell in person?

A. Before I went to the house with Ms.—

Q. Yes.

A. No, ma'am. I contacted her by phone.

Q. Did you, prior to going to see Mr. Patane, do anything to verify the information that Ms. O'Donnell gave you?

A. I verified the information the probation officer gave me with the information with Ms. O'Donnell. I did not go ahead and verify the information except the fact that Tracy Fox had a violation of restraining order signed complaint.

[45]

Q. The probation officer didn't give you any information?

A. He stated that he was a convicted felon and in reference to a domestic violence complaint.

Q. Prior to going to Mr. Patane's house, you didn't have a conversation with the probation officer, did you?

A. I am sorry, the information the probation officer gave to Rich Marianos.

Q. When you say you verified that Mr. Patane—I am not sure what you are talking about here. What did you verify about Mr. Patane before you went to his house?

A. I just wanted to verify some of the information the probation officer gave Rich Marianos about Linda O'Donnell and if Linda O'Donnell actually did see a gun. At that point I was going out there to talk to Mr. Patane about the gun.

Q. My question is when you use the word "verify," what exactly do you mean?

A. Verifying that there was a domestic violence complaint, and Ms. O'Donnell stated yes, I did press a

domestic violence case against him in September of 2000.

Q. When you say verify there was a domestic violence case, you verified it by talking to this person named Linda O'Donnell on the telephone?

A. Correct.

Q. Other than that, did you contact a court to verify it?

A. No, not at that time.

[46]

Q. And other than that—and again we are talking about this period of time prior to your going to Mr. Patane's house—did you run any kind of criminal history check to see whether or not the person who provided you with this information might have a criminal history herself?

A. No, ma'am, I did not.

Q. And did she mention to you that she was on bond for an offense involving a firearm?

A. No.

Q. Ms. O'Donnell did not tell you when it was she last had seen Mr. Patane, did she?

A. No, she did not.

Q. She did not tell you when it was she had last seen the firearm, did she?

A. No, ma'am.

Q. She told you that he kept the firearm on his person or in his car, didn't she?

A. Correct.

Q. When you went to Mr. Patane's house, did you make, prior to going there, make any attempt at all to confer with the prosecutor about whether you could get a search warrant?

A. No, ma'am, I did not.

Q. Did you ask Ms. O'Donnell what kind of car she may be talking about?

A. She stated, if I remember correctly, he had several cars, [47] but I did not ask her for a specific car, no.

Q. All right. So you wouldn't have known what car a gun might have been in at the time you went to Mr. Patane's house, correct?

A. Correct.

Q. Prior to going into Mr. Patane's house to look for the firearm, had either you or Officer Fox conducted a pat-down search of his person?

A. I did not. I don't know if Officer Fox did.

Q. So you did not, at the point in time when you are questioning Mr. Patane, you didn't even know whether he had a firearm on his person, did you?

A. I did not.

Q. And you did not ask him whether he had a firearm on his person, did you?

A. No.

Q. Even though Ms. O'Donnell had said to you he carries it either on his person or in his car, correct?

A. Correct.

Q. Do you recall seeing a child in the house when you got there?

A. I don't remember seeing a child. I remember seeing a dog.

Q. The dog is in the photograph, isn't he? You want to look at Defendant's Exhibit—

A. Which one?

[48]

Q. —F?

A. Yeah.

Q. Is that Mr. Patane's house?

A. I believe so, yes.

Q. Would that be the dog inside the gate?

A. Yes.

Q. Does that picture show there is a mailbox outside of the gate?

A. Yes, it does.

Q. To get into—the gate was closed when you got there, wasn't it?

A. I am not sure. I went right to the back.

Q. How did you get to the back?

A. There is an alley to the right of the picture to get around to the back.

Q. That chain link fence runs all the way around the house, doesn't it?

A. I don't know. I was able to watch the back door from the back.

Q. From where in relation to the chain link fence?

A. I don't remember there being a chain link fence in the back, ma'am.

Q. So you don't remember—you were in the backyard of Mr. Patane's house, weren't you?

A. Yes, ma'am.

[49]

Q. Do you recall how it was you got in there in the backyard?

A. I remember going through an alley and being able to look at the door of Mr. Patane's house, but I don't remember a chain link fence. I will be honest.

Q. In your report, in Exhibit C, you don't mention being in the back of the house at all or watching it from behind, do you?

A. I don't believe I do, no.

MS. GRADY: I don't have any other questions. Thank you.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. HAZRA:

Q. Detective Benner, from whom did ATF first receive knowledge that the defendant could possibly have a firearm?

A. Probation department.

Q. And is ATF—as a part of ATF, are you constantly in touch with probation?

A. Yes, ma'am.

Q. What probation department is that?

A. El Paso County.

Q. And is that the county Colorado Springs is in?

A. Yes, ma'am.

Q. After you received the information from probation, why did you go talk to Ms. O'Donnell?

[50]

A. Just to get some more information and reference the information the probation officer gave Rich Marianos.

Q. So you wanted to talk to two people about it?

A. Correct.

MS. GRADY: I object to the form of that question. I am not sure he said he went to talk to two people.

MR. HAZRA: I can rephrase, Your Honor.

Q. So you wanted to talk to two different sources of information?

A. Correct.

Q. When you came around from the back of the house to the front, I believe you already stated the defendant was in handcuffs?

A. Yes, he was.

Q. Is it police procedure to place someone in handcuffs after patting them down?

A. Yes.

Q. Is it customary to do that?

A. Yeah, for officer safety you want to pat everybody down.

Q. At the time that you went to the defendant's home, did you know anything about the restraining order concerning the defendant?

A. Not at that point. I think there was one mentioned, but I didn't verify it, no.

MS. HAZRA: I have no further questions, Your Honor.

[51]

THE COURT: May this witness be excused?

MS. HAZRA: Yes, Your Honor.

MS. GRADY: Yes.

THE COURT: You are excused. Thank you for your testimony.

MS. HAZRA: I have no further witnesses, Your Honor.

THE COURT: All right. Ms. Grady, do you have any witnesses?

MS. GRADY: I have no witnesses, Your Honor.

THE COURT: I am sorry. The door was being shut. You said yes or no?

MS. GRADY: I have none, thank you.

THE COURT: All right. Do you wish to further argue your motion?

MS. GRADY: I do, Your Honor.

THE COURT: Let's take a brief break and—we will take a 15-minute break and then we will have argument. We will be in recess for 15 minutes.

(Recess at 3:10 p.m.)

(Reconvened at 3:30 p.m.)

THE COURT: Ms. Grady, what is your argument?

MS. GRADY: Your Honor, my argument is a three-prong argument. And I think that the analysis here begins and ends at the first prong which is probable cause. The state of the record here is that a naked accusation was made by a person who [52] has not testified before the Court, whose credibility was never investigated or verified, whose accusations were never corroborated in any way. And based upon that naked accusation, Mr. Patane was arrested. And I think this is the classic example of arrest without probable cause.

We don't even know if the telephone number, and neither did the arresting officers know whether the telephone number that she cited is even connected to the address where Mr. Patane lived, much less whether or not the act which she claimed occurred two days earlier would even constitute a violation of this restraining order. So I think—I think that those are fundamental problems that existed which might rise to the level of reasonable suspicion to warrant a Terry-type contact with Mr. Patane, but certainly not warrant a rise to the level of probable cause.

THE COURT: Well, you are saying because the victim's statement does give a phone number and declare that that's the defendant's home number.

MS. GRADY: Right.

THE COURT: That would be admissible testimony if she were here to testify.

MS. GRADY: Well, I don't know if she were here testifying.

THE COURT: Well, I would agree.

MS. GRADY: Yeah.

[53]

THE COURT: I know people's phone numbers, and I don't have any hesitation—personal knowledge keeping several personal phone numbers, if you wish, but it's human reality that people learn phone numbers, particularly those people you are close to, so they do have that declaration. But what you are really saying is it wasn't verified.

MS. GRADY: The issue wasn't what she knew, but the officers, what the arresting officers knew at the time they arrested Mr. Patane. And that, I think, is where the government's argument that this arrest was supported by probable cause fails because the officers don't know enough information to verify or even, I think, frankly, suspect that Mr. Patane even made the telephone call from the particular number.

And I think it's important to take into account that this accusation that was made by Ms. O'Donnell recounts an event that occurred two days before she reported it. So that again was not taken into account by the officers, and I think should have been before they decided to simply arrest Mr. Patane. Yes, they can go to the house. They can ask him about it, but that's not what they did.

They arrested him and then they—and really they didn't really ask him about the violation of the restraining order. They asked him about the crime of being in possession of the firearm. So I really think that what this really is, [54] was an ATF investigation that was advanced by virtue of this person's accusation that he had violated the restraining order and perhaps was an attempt to bootstrap that accusation into a basis for arresting Mr. Patane; and that, in fact, is what they did. So I think that's where the probable cause analysis here fails is that the officer who was sent in to conduct

the arrest really had no reasonable and articulable basis, in fact, to do it. So that, I think—that's the probable cause analysis.

And the problem here with the facts that were in the hands of these officers at the time that they went to arrest Mr. Patane—

THE COURT: Did they have probable cause to arrest him for the gun violation?

MS. GRADY: No.

THE COURT: Why not?

MS. GRADY: For exactly the same reason. She can't say when she saw him with the firearm. She can't say when she—she didn't say when she last saw him with the firearm, when she last saw the firearm, where she last saw the firearm. She doesn't provide them with enough information. Again, she is just making a naked accusation that he at some point in time was in possession of a firearm.

And the law requires, A, some reasonable—some indicia of reliability on the part of the person making the accusation; and, B, some degree of corroboration of the [55] accusation that is made, otherwise we have the problem that is warned of in the age old case of *Illinois v. Gates*.

And the *Anderson* case which I cited in my motion is interesting because there is a number of defendants who were involved, but in that case the Court rejected the government's probable cause analysis on facts which were to some degree corroborated by personal observations of the officers of one particular defendant, but in this case we don't have that. We just don't have corroboration that supports a warrantless arrest here,

nor do we have, although the government hasn't argued it, exigent circumstances.

So that again brings us to the question of what information is—what information do the arresting officers have in their possession at the time that they arrested Mr. Patane? That's the first analysis, the first prong of the inquiry.

THE COURT: Well, as I understand it, they have the complaint of Ms. O'Donnell. And as far as the arrest, the testimony before me is the arrest was for violation of a restraining order, which neither of you provided this to me, but a person commits that crime if the person contacts, harasses, intimidates, molests, threatens or touches. Which of those verbs did the defendant commit?

MS. GRADY: None. There is two operative words there. The first operative word is person. What person are we talking [56] about? We don't know based on even what Ms. O'Donnell reported to the police.

And second, I don't know and no one seems to have —certainly the government hasn't argued that he violated any particular aspect. If whoever he is or whoever that person is—or I guess the real question is, does one hang-up telephone call constitute harassment or touching or contact or the other words that you have described; and if it does, the second question is, well, who made the call?

So I am unaware of what particular ordinance the police were relying on in terms of violation of a restraining order. I did, you know, research the various ordinances and I researched whether or not there was some special exception under the Colorado Springs Municipal Code for violation of a domestic violence

restraining order and there isn't. The law simply is still that the police must have probable cause to arrest an individual for violation of the restraining order. You know, if there was an exception, I think it would be unconstitutional.

THE COURT: Is that it?

MS. GRADY: No. The second prong of my argument is the manner in which the police executed this arrest. Now, I understand that Officer Fox says that she only told Mr. Patane that he was under arrest at the front door, so she executes it when she follows him into the house to do it. I don't think [57] her subjective analysis here is relevant to the inquiry of whether he was in her custody or not in her custody at that time.

She follows him into the house uninvited and without a warrant to do that, so she crosses the threshold and she finalizes the arrest or effects the arrest by virtue of handcuffing him in the house. That is a *Payton* violation. And that, I have searched high and low in every circuit for a case that is just like this one based on those facts, and I can't find it. But in the *Anderson* case, which I did cite in this circuit, the police—the analysis is different and it turns on whether or not there was an exigency that existed. But the police followed the defendant or took the defendant back into the house or the apartment after they arrested him, and the government's argument at that point was there was an exigency which allowed them to do that. That's not being argued here, and it's plain why that is not being argued here.

But at any rate, there is no exception to the law as it's outlined in *Payton* that would justify Officer Fox arresting Mr. Patane in the house, and there is no break

in the events which transpired after that, which brings me to the *Miranda* violation.

THE COURT: Well, just a minute. Her testimony was that she arrested him outside.

MS. GRADY: She said she told him he was under arrest [58] outside.

THE COURT: That's right.

MS. GRADY: But she puts the handcuffs on him inside because she allows him to go back in the house to get his ID. And, you know, I don't think this analysis turns on semantics. You know, he is outside. She has arrested him for violation of a restraining order. If she is going to arrest him, arrest him. But she does it, you know, she says she tells him he is under arrest.

There is no reason for her to go into the house or to basically let him go into the house. So if she is letting him go back into the house, then I don't think she has effected an arrest yet, but I really think we are splitting hairs here to decide whether or not the arrest took place outside the house or inside of the house when the—

THE COURT: We are hardly splitting hairs given the—regardless, you may think of the authority. It's clear that she can arrest on the porch.

MS. GRADY: If she has probable cause to do so.

THE COURT: Yes. Well, we are setting aside probable cause now, and the uncontested testimony is she arrested him on the porch.

MS. GRADY: Right.

THE COURT: So he is arrested. The question then becomes whether somehow the entry into the house to

do this—[59] she says she is going to maintain control or custody of him and goes with him. I am not—I mean, let's put it this way. If the defendant had testified and said, "She didn't say I was under arrest until we were in the house and she put the handcuffs on me," then maybe you have got an argument. But given to me, what's represented to me is uncontested testimony that she arrested him on the porch. Do you have any authority that says she has to put the handcuffs on then?

MS. GRADY: No. I don't have any authority that turns—I think this is a very factually specific analysis in *Payton*. And frankly, before we wade through this particular aspect of the water, I don't think that any—that the Court's analysis turns one way or another on the *Payton* violation as I heard the testimony. I think it turns—the remainder of the analysis turns on the failure of Officer Benner, who is the person who begins to inquire about the possession of the firearm, his failure to actually read Mr. Patane his *Miranda* rights.

THE COURT: Before you get to that, if I agree with you on probable cause, do we even get to that issue?

MS. GRADY: No, I don't think we do.

THE COURT: It can't be delinked?

MS. GRADY: It could be, but not here. I think the delinking comes under the *Brown v. Illinois* analysis. And is there something that breaks the events in terms of time? No. [60] *Miranda*, certainly reading of *Miranda*, even if it had been done, doesn't under the law untaint the previous taint.

THE COURT: The reading itself.

MS. GRADY: Correct. It is not a cure-all Band-Aid. So certainly my position is that the beginning and the end of the analysis is probable cause and everything that flows therefrom is tainted evidence. But because he is basically in their custody unlawfully and he is questioned in their custody, no doubt about that, about the whereabouts of the gun, and whether you call it consent or whether you call it some statement that is the product of some inducement or promise by the officer, it doesn't matter because even if it was a clear consent, "Yes, I will go get the gun," that is simply the product of his unlawful arrest. And so it becomes an unlawful arrest, poisonous fruit issue.

THE COURT: Well, what about *Miranda*? What's your argument there, assuming I disagree with you, when you get down to the fact that he did not read the *Miranda*?

MS. GRADY: He says he did not read the *Miranda*. He only got so far as "You have the right to remain silent." And the duty is on the officer and on the government to make sure the defendant knows what his rights are. And there is simply no argument here that he did not read Mr. Patane his *Miranda* rights. And I know of no authority that says if a defendant says, "You don't have to read me my rights," you can't waive [61] the rights that you haven't been read. They have to be read. You have to know what you are waiving. That's the whole analysis of knowing and intelligent waiver is derived from. It's not a knowing and intelligent waiver if the rights haven't been read to him. So I don't understand why they weren't except that they simply weren't. And it doesn't matter why they weren't. They just weren't.

THE COURT: Well, the record is pretty bare other than the statement the officer made. I just took his word, assuming I believe the officer, he accepted that he knew his *Miranda* rights. And you are saying that's not sufficient waiver?

MS. GRADY: I am saying that's not sufficient. I don't think that, again, the Court's analysis turns on this particular aspect of the argument.

COURT: I understand.

MS. GRADY: But I think it definitely makes the water murkier here. If we are trying to somehow argue that there is an intervening event which clears things up, and you know, acts as an antidote, if that's the right word, to the events which precede it, the questioning about the gun, you know, one aspect, one line out of *Miranda* doesn't cut it. It only makes it worse. I think it just exacerbates the situation and doesn't help the government's argument.

Nothing here went by the law, not one single—with perhaps, you know, we can argue about whether there was or was [62] not a *Payton* violation. Evidence and the suppression of evidence seldom turns on a *Payton* violation, but it doesn't turn on whether or not evidence is seen as a result of statements made when a person is not lawfully in custody.

After that the analysis turns to whether or not there were some intervening events, and there were none. There is one other case I dug up, Your Honor, in searching for something that would be useful here regarding the probable cause analysis, and I have a copy of it. It is the case of *Whiteley*, W-H-I-T-E-L-E-Y, *v. Warden of the Wyoming State Penitentiary*. The citation is 401 U.S. 560, and it's a 1971 case, but it still

lives in this regard, which is that the police were relying on a bulletin that they received much like this one from another law enforcement agency, and based upon that went and arrested the defendant. It doesn't say whether the information received was from an informant or an unknown informant, but they did corroborate some of the information by observing a car that was driven by the defendant and some certainly observation. But the Court found in that case that the police are required to apply the same standard of review or at least to abide by the same standard of probable cause as any magistrate.

And the standard does not—is not lowered simply because it is the police making the analysis of probable cause as opposed to a magistrate. And the government's argument that [63] probable cause existed in this case was rejected by the Supreme Court. So it's very difficult, and I think not useful to compare the facts of any particular probable cause analysis, but there was some corroboration by the police in this case and that was rejected.

But really here what I think is important and what *Whiteley* warns us against is providing—is allowing the police to abide by a lesser standard or at least a diluted standard of probable cause just because they were the police and not because they are a judicial entity. And easily they could have gone in these particular circumstances. Time is obviously not of the essence. It wasn't of the essence especially to the woman making the complaint. They could have gone and asked for an arrest warrant from a judge, and they did not. It doesn't matter why they did not, which is why I didn't ask anybody. It just doesn't matter. They didn't.

THE COURT: If the complaining party had asserted that the defendant called her, is that sufficient probable cause?

MS. GRADY: If she said she had a conversation with him on the telephone?

THE COURT: Yes.

MS. GRADY: I think that would have risen to the level of reasonable suspicion, but I did look for authority on that particular subject as well, and I could find no case on point. So I am not prepared to stick my neck out and say that would [64] rise to the level of probable cause.

THE COURT: My concern is what more would have to be done. It seems to me if the victim—if indeed the defendant calls and violates the restraining order and the victim doesn't know from where he called or could not obtain any corroboration in any way, why that alone is not sufficient as a victim IDs the defendant. It seems to me that that should be sufficient, as sufficient as if he had assaulted her.

MS. GRADY: In the cases that I looked at involving allegations of restraining order violations, the police have always done something else other than just accept the person's—the complaining witness' word. And usually what happens is the police go to the defendant's home and ask him questions about whether or not he did, in fact, make the call. So that, I think—and if we had that situation here, I would be arguing to the Court that some conversation, you know, should have been had under the *Terry* analysis first before going to, you know, before arresting him.

THE COURT: I am troubled with that, because that would mean all the restrained individual has to do

is say no, and then he or she is beyond arrest. I thought we were trying to avoid that sort of—this is only a domestic dispute and we are not going to get involved with mentality.

It seems to me that somewhere along the line an officer has to be able to rely on the victim's statement. I am [65] not saying that's what happened here, but I am troubled if you say there is an absolute—there has to be or there should be an absolute rule of some sort of corroboration by other means.

MS. GRADY: I don't know, and I am certainly not suggesting because it's a domestic violence case that somehow dilutes the responsibility of anyone or the review, dilutes the review here at all, but I think it's not what happened here. And we don't even know if she is a victim of a order violation. We just don't know that.

You know, again, I go back to the fact that it is an event which occurred two days before she reports it. That should have some meaning in the Court's—you know, in the officer's analysis of whether or not it even happened.

THE COURT: It certainly would have something to do with the exigency of the circumstances, I guess.

MS. GRADY: Well, it does. And I think it simply plays into the question of whether it even happened at all. And you know, I don't know, but I think in that particular circumstance it probably wouldn't even matter if Ms. O'Donnell came here into court and testified because the real issue is what the officers know at the time they arrested Mr. Patane.

THE COURT: Anything else?

MS. GRADY: No. Thank you, Your Honor.

THE COURT: Ms. Hazra?

MS. HAZRA: Yes, Your Honor. This comes as a [66] surprise, I disagree with the defense counsel. I think in this case the police had adequate probable cause to arrest the defendant. I think the key here is that it's not that the police officers had to actually prove beyond a reasonable doubt that the defendant committed a violation of the temporary restraining order, but they at the time had to have a reasonable belief to cause a prudent person to think the defendant had done it.

In this case, Officer Fox goes to speak to the victim, O'Donnell. She is told by the victim that the defendant is to have no contact with her whatsoever. She is told then that the victim—the defendant did call her. The victim recognizes the phone number because she is the defendant's prior girlfriend.

Officer Fox then gets a copy of the temporary restraining order and looks at it and confirms these terms are true and also checks it out in her computer she told you. She printed out and confirmed the defendant was not supposed to have any contact with Linda O'Donnell, the victim in this case. At that point in time Officer Fox had probable cause to believe that the defendant has committed a violation of the conditions of the temporary restraining order. Even though he is not supposed to contact the victim, he has.

It's also important to note at the time of the conversation the victim Linda O'Donnell told Officer Fox that [67] the defendant had a gun, that he went to a gun show and bought the gun, and that she was very fearful of him and what he could do, what he would do to her.

So in this case, I mean, I think it's also important to note this is a domestic violence context, that there isn't that many witnesses to this. It's going to be what the victim says and what the defendant says, and in this case she had probable cause necessary to go forward and arrest him. I disagree the ATF needed to bootstrap onto this.

Actually, ATF had two sources that said the defendant was a prohibited person, was not allowed to possess a firearm. They received information from the probation department that supervised the defendant that probation was aware he had a gun—that they thought he had a gun, excuse me. And then they went —ATF went and confirmed this information by talking to Ms. O'Donnell who said the defendant and she had gone to the gun show and the defendant carried this gun with him at all times. At that point in time they knew he had a gun from two different sources. One was the probation department and one was his ex-girlfriend.

THE COURT: But he wasn't arrested. The complication in my mind, Ms. Hazra, is that, quite frankly, I would say there was more probable cause to arrest him for the gun violation than there was for the violation of the temporary restraining order, but that's not what happened. Ms. Fox [68] should have been the one at the back door and Mr. Benner the one at the front door.

I, you know, let me just ask you this. Why, when you do have a deep corroboration concerning the gun, why didn't the gun violation become uppermost in the officers' minds, and proceed and ask questions and do something with regard to the gun?

MS. HAZRA: I believe that's why they were at the house. They wanted to conduct an interview of the defendant.

THE COURT: But did they want—is it—well, I shouldn't speculate, but it doesn't—let me ask you. How was the violation of the statute committed?

MS. HAZRA: Well, Your Honor, the temporary restraining order in the statute says they are to have no contact, and a telephone call does constitute—

THE COURT: What contact did he have with her?

MS. HAZRA: He called her.

THE COURT: How do we know that?

MS. HAZRA: Because when she did the star 69 and star 57, it goes back to his phone number.

THE COURT: It does go back to the number, but the call was terminated; is that right?

MS. HAZRA: That's correct, Your Honor. But getting calls frequently and hang-ups and contact also can be incredibly harassing as well.

[69]

THE COURT: As I understand, as I understand, this only happened once.

MS. HAZRA: Yes, Your Honor.

THE COURT: What—if indeed I am willing to assume this was the defendant that made the call, dialing it in and then he thought maybe I am not supposed to be doing this. I think I better hang up.

MR. HAZRA: But, Your Honor, he didn't.

THE COURT: Did he commit a crime?

MS. HAZRA: Under the terms of the temporary restraining order, he did.

THE COURT: I don't have the temporary restraining order.

MR. HAZRA: But you have the testimony of Officer Fox, as well as you have the statement that she said no contact.

THE COURT: I understand that. I will accept it says no contact because that's what the statute says, but I am just saying what if the defendant said this isn't—"I shouldn't be doing this" and hangs up? Has he committed a crime?

MS. HAZRA: In terms of the temporary restraining order, yes. He also didn't hang up right away. Obviously, there is time for her to pick up the phone and hear him or hear something.

THE COURT: Where do you get that?

MS. HAZRA: S he said she picked up and the other party [70] hung up. Did I misspeak? I am sorry, Your Honor. "I answered the phone and the other party hung up," so it wasn't like as he dialed he was realizing I am not supposed to do that.

THE COURT: Let me give you another hypothetical, that as people will tell you, I call people thinking I am calling someone else and dial my home number, whatever. I just dial it. I dial the wrong number and somebody answers it. Sometimes I say, "Whoops, sorry. I misdialed," but I will have to confess here in open court that I have been embarrassed and hung up.

MS. HAZRA: Well, Your Honor, you are not under a temporary restraining order.

THE COURT: Well, I am concerned with probable cause. That is the totality of the probable cause link, is it not, to this defendant, that uncorroborated statement of the victim? I don't want to minimize that, as I indicated to defense counsel, but we don't have any corroboration of the number or anything else, but we also don't have any direct verbal communication as I understand the record.

MS. HAZRA: That's correct, Your Honor. But I think the key here is it is just probable cause. It's not that the police had to —

THE COURT: I recognize that, believe me.

MS. HAZRA: Moving on to the next point that the *Miranda*, the *Miranda* statements and the consent. I believe [71] Detective Benner indicated the defendant was aware of his *Miranda* rights. He started to read him his rights.

THE COURT: Do you have any authority on that? I understand. I just—what's a good case for me to look at as to that? The testimony is also unequivocal that the *Miranda* rights were not read, that he relied solely on the base on what the defendant told him.

MS. HAZRA: Partially.

THE COURT: That's uncontested. That's what the testimony is.

MS. HAZRA: I actually don't have a citation here, but I would be happy to provide the Court with some authority with permission.

THE COURT: I would ask you to do that.

MS. HAZRA: I certainly will, Your Honor. So he started to advise him and he clearly understood them.

And even if the Court was to find it was not a valid *Miranda* waiver, the evidence shows the statements were voluntary. There was no police coercion, no hitting, no gun drawing, so the statements were voluntary, as was the consent in this case.

THE COURT: It's also uncontested that he was handcuffed and in custody.

MS. HAZRA: That's correct, Your Honor.

THE COURT: And he was upset, at least at one time.

MS. HAZRA: But to find them not voluntary there has [72] to be some type of coercive police behavior, *Colorado v. Connelly*. Detective Benner did not testify he did anything that would constitute coercion, as did Fox. As you stated, Officer Fox testified the defendant was arrested outside on the porch.

'The Tenth Circuit in *United States v. Butler* 966 F.2d 619 has said after you place him under arrest, the officers can go inside a home to cover with clothing the defendant. It's sort of a limited exception understanding that once under arrest outside the home, defendants do need clothing or in some cases—in this case it was shoes, but you also recognize they may need a jacket or something. That is a permissible entry, especially in this case where there is no *Payton* violation because the arrest occurred outside the home.

THE COURT: I think that's the evidence as far as I know.

MS. HAZRA: Does the Court have any other questions for me?

THE COURT: No, I don't. I want to look at a couple of cases and I will reserve my ruling. When is this scheduled for trial? Pretty quick, right?

MS. HAZRA: October 9, I believe.

THE COURT: A couple weeks?

MS. HAZRA: October 9, almost two weeks.

THE COURT: You are the first set criminal case.

[73]

Assuming that I rule within the week, will you be prepared to go to trial?

MS. HAZRA: Yes, Your Honor.

THE COURT: Ms. Grady?

MS. GRADY: Yes. We are talking about alternatives, but we would be ready.

THE COURT: I was looking for an excuse to avoid having to rule within the next week, but I will rule and either do that by written order—if I do it by written order, I will advise you as soon as I have decided, even though the decision isn't written yet, or will call you in for a ruling and we will just do that. I want to read a couple of things.

MS. HAZRA: I can file those cases by tomorrow, Your Honor, if you would like.

THE COURT: I would appreciate it. If you have any particular case, Ms. Grady, you want me to look at in addition to that you have already given us, you can both have until 5:00 o'clock tomorrow to file cases, obviously besides the other cases that you have filed with me. Any questions?

MS. HAZRA: No, Your Honor.

MS. GRADY: Thank you for your time.

THE COURT: The defendant must be on bond?

MS. GRADY: Yes.

THE COURT: Any objection to his bond continuing?

MS. HAZRA: No, Your Honor.

[74]

THE COURT: Bond will continue, then, and we will be in recess.

(Recess at 4:10 p.m.)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Criminal Case No. 01-CR-228

UNITED STATES OF AMERICA, PLAINTIFF

v.

SAMUEL PATANE, DEFENDANT

REPORTER'S TRANSCRIPT ORAL RULING

Proceedings before the HONORABLE WALKER D. MILLER, Judge, United States District Court for the District of Colorado, commencing at 11:00 a.m., on the 3rd day of October, 2001, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

Sunseeta Hazra, Assistant United States Attorney, 1225 17th Street, Suite 700, Denver, Colorado 80202, appearing on behalf of Plaintiff.

Virginia Grady, Federal Public Defender, 1099 18th Street, Suite 300, Denver, Colorado 80202, appearing on behalf of Defendant.

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Janet Morrissey, 1929 Stout Street, Room C-109, Denver, Colorado, 80294, (303) 893-2835

[2]

PROCEEDINGS

THE COURT: We are here on Case No. 01-CR-297—excuse me, 228, United States of America v. Samuel Patane. I give up trying to pronounce it correctly.

Would counsel enter their appearance.

MS. HAZRA: Sunseeta Hazra, United States Attorney for the Government.

MS. GRADY: Virginia Grady appearing on behalf of Mr. Patane.

THE COURT: The issues before me are on motion to suppress filed by the defendant, and I am going to make some findings and conclusions here orally.

Factually it's important to note that the evidence is uncontroverted that the arrest took place on the porch of the defendant's residence; and, therefore, I am not resolving any *Payton*—that's P-A-Y-T-O-N—issues. The only evidence to the contrary is a reference in one of the officer's notes that—Officer Benner's notes that the defendant was arrested in the house. But he also testified that when he first saw the defendant, he was on the outside on the lawn, as I recall, of the house, Benner having been in the backyard.

And the *Payton* to which I refer is *Payton v. New York*, 455 U.S. 573, 1980 case. The defendant nevertheless has argued that there was no probable cause. As I recall the argument, the defendant asserts that it was a naked arrest without [3] probable cause, relying on the principles of *Illinois v. Gates*, 462 U.S. 213, 1983 case. And the arrest was for an alleged violation of the temporary restraining order and not for the possession

of a weapon by a felon, the crime with which the defendant is charged in this matter.

The evidence is also not controverted in the sense with regard to the charge. Indeed Officer Benner reports, I believe, and he testified to the same effect that he was not arresting the defendant on the felon in possession charge at that time as he would be conducting some further investigation. I have looked at the record to determine whether or not there is probable cause for the arrest on the violation of the temporary restraining order.

The evidence is that Linda O'Donnell, who had a previous intimate relationship with the defendant, complained about a hang-up phone call that allegedly occurred on June 4th. Her complaint to Officer Fox was on June 6th. And the complaint was that she had received a, one, hang-up call. And when she used the call-back service, star 69, it came from a number that she recognized as the defendant's.

During the interview O'Donnell—interviewed by Fox, O'Donnell also described the fact that the defendant had a gun, that she had been with him when he purchased it, that he kept it on his person in his room or in his car. And on the basis of that Officer Fox determined that she was going to—she had [4] probable cause to arrest the defendant, and her offense report is signed by her that there was probable cause that defendant had committed the offense with which he was charged.

The record and the testimony is unclear to me exactly how it was originated, but I note that there was communication between Officer Fox and the Officer or Agent Marianos with the Bureau of Alcohol, Tobacco &

Firearms, and that led to contact of Officer Benner. And on the same day Officer Benner and Marianos went to the supposed place of employment of the defendant, found he was not there, and by phone contact knew that Officer Fox was going to the residence. And Officer Benner went and met Officer Fox at the residence and came to the residence from the backyard.

As to the determination of the probable cause for an arrest for violating the temporary restraining order, I note that the—no one verified whether the call was indeed placed on the date from the numbers identified. No one determined whether the defendant would agree, and indeed when being arrested, he denied having made the call.

No one determined at the time the complainant's credibility and indeed arrest was being declared and was effectuated solely on the basis of this person's testimony of one hang-up call. And I also note for the record that there is no testimony of any type that there was a series of calls, and indeed even if there was evidence corroborating that the call [5] had been made, there is no investigation to determine whether or not it might have been made by mistake; as I noted to counsel that I certainly will confess and my life experience is that people do make calls to numbers with which they are familiar, not intending to make the call.

It's also possible that he may have started off and decided not to complete the call. But in any case, it was one call. There was no verification which presumably could have been done rather easily.

I also note that there is a two-day delay between the event and the call to the police, and then the Bureau is involved and an arrest is made that same day. There is

apparently—and I accept the testimony and it's not consistent with the exhibits, but Officer Benner said that he had been advised that a probation officer talked to Marianos—

MS. HAZRA: Marianos, Your Honor.

THE COURT: —Marianos sometime in this series of events, and that he had heard that the defendant may possess a gun, which may have been some corroboration of the O'Donnell statements, but that would be the only corroboration that the arresting officer had. And that corroboration is only that it may be she is telling the truth about the gun, but it has nothing to do with the crime for which he was arrested, namely the supposed unlawful contact in violation of a temporary restraining order.

[6]

I do note in connection with that testimony that Detective Benner in his notes, which are Exhibit C, states that on the day after the arrest he and Marianos met with the probation officer, and there is no mention at that time in the report of an earlier report. He does verify the convictions apparently, but that's the day after the arrest and would normally be something that one would expect a properly trained police officer to verify before arresting on a gun charge.

The arrest, therefore, I conclude was for violation of temporary restraining order based on mere suspicion. And I agree with defense counsel that this arrest without corroboration in any form concerning the crime involved does violate *Illinois v. Gates*, and the complete absence of corroboration, which could easily have been obtained with regard to at least the phone call, in a situation that is, unfortunately, not unusual for claims

and counterclaims to be thrown between people who have separated some sort of an intimate relationship is just inadequate and does not meet the standards of *Illinois v. Gates*. There has to be some corroboration of one individual's statement in these circumstances in my judgment. Therefore, I conclude that the arrest for the temporary restraining order violation lacked probable cause.

I think I noted—I just looked in my scribbles previously—that unfortunately what happened is that when the [7] officer went to the residence, she was going to arrest the defendant and she did so even though the defendant denied having made the call. So we have an arrest based upon—without any independent corroboration—one person to an intimate relationship where the actions are denied by the other, and there is not even a series of contacts or something of unexplained context. It's just one contact which I have indicated could, in my life experience, have been an innocent mistake; and nor do we know, incidentally, whether the phone in question is solely accessed by the defendant or others in the house where he lived. So there is a lot of reason to wonder what happened, and certainly one could have suspicion that it did happen and it may have been motivated by an intent to harass, but that's suspicion only. And as we all know, mere suspicion is not the same as probable cause.

The government argues notwithstanding that one might reach that conclusion with regard to that crime, that the defendant could have been—and that was the subjective intent of the officer to arrest, that the defendant—there was probable cause to arrest the defendant on the gun charge.

And I think the—I agree with the government that the knowledge of the individual officers, even though not communicated, is corporate knowledge and generally can be considered. And the government argues that under the objective standard there really was probable cause to arrest.

[8]

I am willing to assume, without deciding that that's the case, and if one assumes that there was independent evidence from the probation officer before the events of June 6, and that's—I am not deciding that issue. As I have noted, there is some conflict when you compare it to the documents, but assuming there was that corroboration, there may be probable cause—may have been probable cause to arrest, although obviously I note for the record that the officer didn't think so, that he felt he needed to continue his investigation and concluded that he didn't have probable cause.

But as Ms. Hazra correctly argues, that if indeed the arrest had been for the possession by felon and it's shown that there was knowledge with the officers to establish probable cause, there may well have been probable cause. Certainly assuming again that there was corporate knowledge of the probation officer's report at the time of the arrest, there is more evidence to support probable cause for that arrest than there is for the violation of temporary restraining order.

But the government presents an issue, and my findings I state that way because I am deciding in the first instance that even if there is probable cause to arrest on the gun on the date of the arrest, I still would suppress because of my conclusion that there is not

probable cause for the violation of the temporary restraining order.

And I need to explain that reasoning for any appeal.

[9]

And the authority cited by the government—I cited in particular *United States v. Davis*, 197 F.3d 1048, 1999 case. The way I read these cases, that that was one of these stops where there was various evidence considered, and the particular officer in his testimony for stating why he thought probable cause existed didn't include all of the items that could have been reported, and—or could have been considered.

And the Court is saying with regard to the particular charge, that if there is knowledge by the police officers that would otherwise constitute probable cause as to the charged offense for which the individual is arrested, that the Court can look to these other matters on an objective basis. But to allow the arresting officers after the fact to go back and scramble and look for evidence that might justify an arrest on another charge seems to me to be in many of the now almost trite phrases fraught with peril, stepped on a slippery slope, and would not be a good rule to establish; namely that even though you don't have probable cause to arrest for one crime, the one you are intending to arrest for, if you can go and find corporate police knowledge of another crime for which that individual could be arrested and justify the arrest after the fact and to relate back to the time of the arrest I just think would be inconsistent with our tradition of guarding liberties and requiring probable cause before we arrest people.

So even though there may be probable cause at the [10] moment of his arrest on the gun charge, I do not—

I would not allow that to establish a rule that could be misused or manipulated, which I just do not feel I can take that step, and government cites no authority that would justify that. As I say, the authority cited deals with the charged offense or with the individuals arrested.

We have talked—have I forgot anything we talked about? Okay. Do either of you have any questions? You, I guess, Ms. Hazra, I am ruling against you first.

MS. HAZRA: I have no questions, Your Honor. I would like to ask—I need to talk to my supervision in the appellate division about this.

MS. GRADY: Did you want to make any findings on the *Miranda* question?

THE COURT: As I did conclude, everything which flows from the arrest, which includes the *Miranda* questions and supposed waiver, it's unnecessary for me to make that ruling based upon my conclusion that all subsequent events tainted. I guess if there is an appeal and I am overruled, that issue should be resolved since we would have the hearing.

I will—I agree with the defendant that—and the thoughts expressed in *United States v. Bland*, 908 F.2d 471, Ninth Circuit case from 1990, that again with concern for manipulation of circumstances, that to accept a statement, and there is no contest that the statement was made, that I know my [11] rights and the rights are truncated at "You have a right to remain silent" and there is nothing else, whether there has been a knowledgeable waiver has not been established in the sense that, how do we know he knows his rights?

The statement by the defendant in the *Bland* case was even more direct, something to the effect that he

heard the rights a million times, and it was only the last sentence virtually of the *Miranda* warning that was omitted. And this, only the first sentence is stated. I think the only way you accept a waiver is—to avoid these arguments—to make sure that the person has knowledge is to say, well, do you know that, one, two, three, four, and that way this argument does not—had the officer done that and able to testify that he had done that, then we would have a knowledgeable, knowing waiver.

MS. HAZRA: Your Honor, the government actually concedes that it was not a knowing waiver, but I was just wondering if you would make a finding of voluntariness of statements if you are going to go on.

THE COURT: No, that would be the basis for my ruling. Anything else?

MS. HAZRA: No, Your Honor.

THE COURT: Where are we on speedy trial?

MS. GRADY: I didn't bring my copy of my motion. I don't know when it was filed.

[12]

THE COURT: Excuse me?

MS. GRADY: I don't know when I filed the motion to stop the clock. I am unhelpful. I don't know how many days we are, if we are on speedy trial, when I filed the motion.

THE COURT: Well, I direct counsel to schedule a trial and trial preparation conference within the—which dictates the speedy trial this week. That is, you need to set the trial this week for whenever.

MS. GRADY: Okay.

THE COURT: Any questions?

MS. HAZRA: No, Your Honor. Thank you.

MS. GRADY: Thank you.

THE COURT: We will be in recess.

(Recess at 11:34 a.m.)

* * * * *

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 11th day of October, 2001.

/s/ JANET M. MORRISSEY
JANET M. MORRISSEY

VICTIM INFORMATION

CASE NUMBER 01-19094

Victim's Name	DOB	AGE	SSN	Cross Complaint? Y N Summons #
O'DONNELL, LINDA	07-07-57	43	524-90-0267	

Victim's Address: 822 CALVERT AVE, COLO SPGS, CO 80904	Home Telephone: 324-9175
Contact Address: SAME	Contact Telephone
Employer Address: NOT EMPLOYED	Work Telephone

Race	Sex	Height	Weight	Hair	Eyes
W	F	5-02	130	BLN	GRN

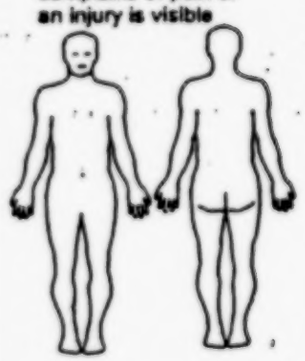
Child Name	DOB	Address (if different from victim)	Did Child Witness Incident Y N
Child Name	DOB	Address (if different from victim)	Did Child Witness Incident Y N
Child Name	DOB	Address (if different from victim)	Did Child Witness Incident Y N

Witness Name	DOB	Address	Zip Code	Hm. Ph. / Wk.(or contact) Ph.
Witness Name	DOB	Address	Zip Code	Hm. Ph. / Wk.(or contact) Ph.

Active Restraining Orders:	☒ Mandatory (72 hour)	☒ Temporary	☒ Permanent	☐ Domestic Relations	Court Case Number: 01M5058
Victim/Suspect Status	☐ Married	☐ Separated/Divorced	☒ Cohabitants	☐ Dating (Not Living Together)	☒ Other: INTIMATE RELATIONS
If Known Who Called	☒ Victim	☐ Family Member	☐ Neighbor	☐ Suspect	☐ Other

Check If Applicable	☐ Drugs	☐ Alcohol	☐ Pregnant	☐ Child Protective Services Notified Y N	☐ Animals in Home	☐ Humane Society Notified		
	☐ Throwing Things	☐ Pushing ☐ Shoving	☐ Grabbing	☐ Slapping W/Open Hand	☐ Kicking	☐ Biting	☐ Hitting W/ Closed Fists	☐ Choking
Weapons Involved	☒ No Weapons	☐ Weapons Displayed, But Not Used	☐ Assault With Weapon(s)	☐ Edged Weapons	☐ Firearms	☐ Blunt Objects	☐ Other	
Injuries Noted	☐ No Injury	☐ Pain, But No Visible Injury	☐ Visible Injury	Photographs (MANDATORY - IF VISIBLE INJURIES) ☐ Yes: ☐ 35mm ☐ Polaroid ☐ Video ☐ No				
Medical Attention	☐ Refused Medical	☐ Medical At Scene	Hospital or Medical Facility:					
Victim's Emotional State:	☒ Calm	☐ Angry	☐ Withdrawn	☐ Apologetic				
	☐ Crying	☐ Upset	☐ Scared	☐ Other				

Mark with an X any area where victim complains of pain or an injury is visible



Victim Questions:
Has the suspect ever done this before? YES If so, When?
Any previous violence with another person? YES If so, Whom EX-WIFE
Has suspect made threats? YES If so, What and to Whom?
Were all the injuries to the victim caused by this suspect? N/K If not, by whom?

VICTIM NOTIFICATION REQUEST

☒ THE ABOVE LISTED VICTIM HAS REQUESTED THAT HE/SHE BE NOTIFIED OF THE PENDING RELEASE OF THE DEFENDANT BY EL PASO COUNTY JAIL AUTHORITIES

VICTIM'S SIGNATURE Linda L. O'Donnell VICTIM NOTIFIED BY: DATE:

VICTIM'S STATEMENT: On Monday June 4, 2001 at 8:00 p.m. my telephone rang - I answered the phone and the other party hung up. I pushed *57 and then pushed *69. The last call return (*69) stated the last call received was (719) 471-3444. I recognize the phone number (719) 471-3444 as Sam Patane's home phone number.

State of Colorado } ss. County of El P...
Certified to be a ... and Correct
copy of the original ... thereof.

SEP 20 2001

LEE ...
CLERK OF THE ...
By ...

DEFENDANT'S EXHIBIT
A
01-CR-228-WM

000002

BEST AVAILABLE COPY

RECEIVED JAN 07 2002

D048633 2

COLORADO SPRINGS POLICE DEPARTMENT
X OFFENSE REPORT
DOMESTIC VIOLENCE COMPLAINT
THE PEOPLE OF THE STATE OF COLORADO (16-6-803.3)
X ADULT ☐ JUVENILE

Case Report No.	Call Screen No.
01-19094	798708
Booking No.	**MNI No.**
200109176	

Defendant Name (First) SAMUEL	(Middle) FRANCIS	(Last) PATANE	(Suffix)	DOB Mo 11	Day 13	Yr 49	Age 30				
Defendant's Address 837 E. VERMIJO ST.	(City) COLO SPGS	(State) CO		Zip Code	Home Telephone ( ) 471-3494						
Employer Name PAR LONG FORD 1212 MOTOR CITY DR	Employer Address (City) C/S	(State) CO	Zip Code 80906	Work Telephone ( ) 575-7151							
Place of Birth (City/State) NEW YORK	Race W	Sex M	Height 507	Weight 190	Hair BRO	Eyes HAZ	SSN 100-40-6231				

To Answer Charges of Violation(s) of 1973 C.R.S. as Amended:
☐ MISDEMEANOR
☐ FELONY
☐ BOTH
☐ DICTATED SUPPLEMENT

	Statute	Title
CHARGE No. 1	18-6-803.5	VIOLATION OF RESTRAINING ORDER
Description	SUBJ VIOLATED MANDATORY RESTRAINING ORDER BY CALLING VICTIM.	
CHARGE No. 2		
Description		
CHARGE No. 3		
Description		
CHARGE No. 4		
Description		

Approximate Location of Violation, City of Colorado Springs, County of El Paso: 822 CALVERT AVE	Violation Date 6-4-01	Approximate Time of Violation 2000	Companion Statement #
Items Placed in Evidence [ ]	Custody Location 837 E VERMIJO	Custody Date 06-06-01	Custody Time 1925	Cross Complaint #

☐ Weapons Involved ☐ No Weapons ☐ Weapons Displayed, But Not Used ☐ Assault With Weapon(s) ☐ Edged Weapons ☐ Firearms ☐ Blunt Objects Weapon Description:

Circle if Applicable (offender): Drugs Alcohol Sho/DI Registered Sex Offender Gang--Gang Se:
DVERT Involvement Y N
Scars/Marks/Tattoos
Aliases
Probation / Parole Officer Name

( ) JUVENILE COMPLAINT AND REFERRAL

CHILD'S SIGNATURE _____ DATE _____ TIME _____
PARENT'S SIGNATURE _____ DATE _____ TIME _____
Parents Notified: Y N Date: _____ Time _____ AM/PM
Officer _____ NO: _____

Mother's Name / Address	Home Phone	Work Phone
Father's Name / Address	Home Phone	Work Phone
Guardian's Name / Address	Home Phone	Work Phone

SIDS Referral Y N | 100 Families Y N | Interviewed Y N | Name of Parent / Guardian present during interview

State of Colorado, County of El Paso
Certified to be a true and correct copy of the original in my custody.
SEP 2 0 2001
CLERK OF THE DISTRICT COURT
By _____ Deputy

EMERGENCY CONTACT INFORMATION *(For Defendant)*

NAME (Last, First Middle)	RELATIONSHIP	ADDRESS	TELEPHONE

VICTIM INFORMATION

VICTIM'S NAME LINDA S. O'DONNELL DOB 07-07-57 SSN 524-90-0267
ADDRESS 822 CALVERT AV, C/S, CO 80904 TELEPHONE 328-9175

THE UNDERSIGNED HAS PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT COMMITTED THE OFFENSE(S) AGAINST THE PEACE AND DIGNITY OF THE PEOPLE OF THE STATE OF COLORADO.

/OFFICER: Lyn L Fox No. 1750 /OFFICER: D. MULSO No. 284
/SERVED BY: Lyn L Fox No. 1750
/COMPLAINING WITNESS X Linda S. O'Donnell DATE 6/6/01

DEFENDANT'S EXHIBIT 1105

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PROBABLE CAUSE AFFIDAVIT

ON 06-06-01 I OFFICER T. FOX/1750P WAS DISPATCHED TO 822 CALVERT AV ON A REPORTED VIOLATION OF RESTRAINING ORDER. THE SUSPECT, SAMUEL PATANE, HAD A TEMPORARY RESTRAINING ORDER ON HIM EFFECTIVE 06-03-01 EXPIRING 06-06-01 AT 1159 HRS. ON 06-04-01 AT APPROX 2000 HRS, PATANE, CONTACTED THE VICTIM, LINDA ODONNELL, BY CALLING HER ON THE PHONE. PATANE WAS ORDERED TO HAVE NO CONTACT WITH THE VICTIM.

THE ORIGINAL RESTRAINING ORDER WAS THE RESULT OF A DOMESTIC VIOLENCE CHARGE OF HARASSMENT. THE VICTIM ODONNELL STATED THAT PATANE HAS PREVIOUSLY THREATENED TO KILL HER. ODONNELL ALSO STATED THAT SHE WAS WITH PATANE WHEN THEY WENT TO A GUN SHOW AND PATANE PURCHASED A GUN. THE DISTRICT ATTORNEY FILED HARASSMENT AND MENACING CHARGES ON PATANE.

ODONNELL BELIEVES PATANE KEEPS THE GUN ON HIM OR LOCKS IT IN HIS VEHICLE. ODONNELL STATED THAT PATANE HAS THREATENED TO KILL POLICE OFFICERS AND THAT HE HAS A LONG LIST OF OTHER PEOPLE HE WANTS TO KILL. ODONNELL IS AFRAID THAT NOW PATANE HAS A GUN THAT HE WILL COME AND KILL HER.

UPON ARREST OF THE SUSP, HE ADMITTED TO HAVING A 9MM GLOCK WHICH HE TURNED OVER TO ATF AGENT JOSH BENNER.

PATANE STATED THAT HE NEVER CONTACTED THE VICTIM AND THAT SHE WAS FALSELY ACCUSING HIM. HE ALSO STATED THAT ODONNELL PURCHASED THE GUN.

UNDER PENALTY OF PERJURY, I AFFIRM THAT ALL THE INFORMATION CONTAINED UPON THIS DOCUMENT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

AFFIANT T. FOX/1750P Print Name TRACY L. FOX/1750P

On this date, The Affiant signed this Affidavit and swore to its truth

060604 R. Thomas

Date Notary Public

My Commission Expires 1/19/2005

~~5735 E. Las Vegas Street~~

My Commission Expires CO 80906

000004

(106)

COLORADO SPRINGS POLICE DEPARTMENT
OFFENSE ☒ INCIDENT ☐ SUPPLEMENT ☐

D A CCR G H F

CASE REPORT NUMBER: 01-19192

OFFENSE

TITLE: POSSESSION OF WEAPONS BY PREVIOUS OFFENDERS
STATUTE NUMBER: 18-12-108
LOCATION OF OCCURRENCE: 111 S. TEJON STREET #503
ZIP CODE: 80903

ZONE	SECTOR	DATE AND TIME OCCURRED	MONTH	DAY	YEAR	TIME	DAY OF WEEK	DATE AND TIME REPORTED	MONTH	DAY	YEAR	TIME	DEC CODE
2	1	ON OR BETWEEN	06	06	01	1725	WED		06	07	2001	1015	

AREA COMMAND: N. E (W)

UCR

OCL	OFF	CLS	STT	PREMISES	UCR OFFICER ASSAULT ACTIVITY	UCR OFFICER ASSAULT WEAPON	OCCUPATION

OFFICERS KILLED #	OFFICERS ASSAULTED #	NUMBER OF ARRESTS
0	0	ADULT 1 JUVENILE ___

☐ SUSPECT(S) CAN BE NAMED/LOCATED ☐ SUSPECT(S) CAN BE DESCRIBED/IDENTIFIED
☐ CRITICAL PHYSICAL EVIDENCE ☐ SUSPECT VEHICLE CAN BE IDENTIFIED/LOCATED

VICTIM

NAME (LAST, FIRST, MIDDLE)	RACE	SEX	AGE	DATE OF BIRTH	OCCUPATION
STATE OF COLORADO					

ADDRESS RES	CITY	STATE	ZIP CODE	BROCHURE	TELEPHONE (H-DAY)
					( )

BUS				
				( )

BUSINESS NAME (IF BUSINESS IS VICTIM)	BUSINESS ADDRESS	BUSINESS PHONE

CODES: RP – REPORTING PARTY W – WITNESS V- VICTIM P- POLICE OFFICER A – ARRESTEE S- SUSPECT *ONLY NECESSARY FOR SUSPECT/ARRESTEE

CODE	NAME (LAST, FIRST, MIDDLE)*	RES. ADD.	RACE	SEX	AGE	BROCHURE
S	PATANE, SAMUEL FRANCIS	837 E VERMIJO STREET CITY, STATE, ZIP COLO. SPGS. CO	W	M	50	

HT*	WEIGHT*	HAIR*	EYES*	BUILD*	TELEPHONE	DATE OF BIRTH	SUMMONS NUMBER(S)*
5-7	140	BRO	HAZ	MED	(W) 575-7151 (H) 471-3494	11-13-49	

CLOTHING*	ALIAS/NICKNAME*	CSPD NO.

VEHICLE

☐ STOLEN ☐ SUSPECT ☐ TOWED ☐ VICTIM ☐ OUTSIDE RECOVERY ☐ OWNER NOTIFIED ☐ LOCAL RECOVERY

VEHICLE YEAR	VEHICLE MAKE	VEHICLE MODEL	VEHICLE STYLE	VEHICLE COLORS – TOP/BOTTOM

VEHICLE LICENSE NUMBER	LICENSE TYPE	LICENSE YEAR	LICENSE STATE	VEHICLE LICENSE COLORS – PRIME/NUMERALS

VEHICLE IDENTIFICATION NUMBER/MOTORCYCLE FRAME NUMBER	VEHICLE TOWED BY/TO	VEHICLE INSURED BY	VEH. ENGINE NUMBER

VEHICLE OWNER (LAST, FIRST, MIDDLE)	ADDRESS	TELEPHONE

☐ PICKUP ISSUED FOR ABOVE VEHICLE ☐ PICKUP ISSUED FOR ABOVE SUSPECT ☐ PICKUP CANCELLED

(X) IF INCLUDED IN REPORT
☒ SUSPECT(S) ☒ WITNESS(ES) ☐ ADDITIONAL VICTIM(S) ☐ HOSPITALIZED ☐ PROPERTY DESCRIPTION(S) ☒ EVIDENCE INVOICE ☐ VICTIM STATEMENT(S) ☐ WITNESS STATEMENT(S) ☐ DICTATED SUPPLEMENT ☐ PRIORITY

PROPERTY

VIC NO.	ITEM NO.	QNTY	BRAND NAME	MODEL NO./SIZE	PROPERTY DESCRIPTION	SERIAL NUMBER	STOLEN (4) X-DAMAGED	RECOVERED ($)	UCR TYPE

DEFENDANT'S EXHIBIT
C
01-CR-228-WM

NARRATIVE

ELEMENTS/METHOD
ADDITIONAL OFFENSE: NONE SUSPECT INFO: YES EVIDENCE: YES

On 06-06-01 at approx. 1630hr I, Detective Josh Benner 1480P, was contacted by ATF RAC Marianos concerning a possession of weapon by a previous offender. According to ATF RAC he had information from the Probation Department that the suspect, Samuel Francis Patane DOB: 11-13-49, had a domestic violence conviction and was under a temporary restraining order. Further, Patane was also in possession of a Glock .40 caliber pistol after being convicted of a domestic violence complaint. I contacted the victim of the temporary restraining order, Linda S. O'Donnell, who stated Patane had the pistol with him at all times, either on his person, in one of his vehicle or at his house located at 837 E. Vermijo Street. While speaking with Ms. O'Donnell, I was informed Officer Fox 1750P was at her house documenting a violation of a restraining order complaint. Officer Fox and I contacted Patane at his house on 06-06-01 at approx. 1725 and he was placed under arrest for the violation of the restraining order. The Glock .40 caliber pistol was recovered from inside his home. The case was referred to ATF RAC Marianos for pending federal charges.

CERTIFICATION

UCR DISPOSITION	PATROL INVESTIGATION CONTINUING	ASSIGNED TO	DATE	COMPANION NUMBERS
☒ OPEN ☐ CLEARED BY ARREST ☐ UNFOUNDED ☐ EXCEPTIONAL CLEARANCE	YES ☐ NO ☒		060603	

OFFICER NAME/NUMBER	SUPERVISOR	DATE	PAGE
DETECTIVE J. BENNER 1480P	SGT. REISLER 379P		1 OF 1 (107)

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COLORADO SPRINGS POLICE DEPARTMENT
CONTINUATION/SUPPLEMENTAL REPORT

CASE REPORT NUMBER: 01-19192

OFFENSE	STATUTE NUMBER	UCR RECLASSIFICATION TO	UCR CODE
POSSESSION OF WEAPONS BY PREVIOUS OFFENDERS	18-12-108		

VICTIM'S NAME (LAST, FIRST MIDDLE)	DATE OF THIS REPORT
STATE OF COLORADO	06-07-01

ARRESTEE NAME (LAST, FIRST MIDDLE)	RES ADD / CITY & STATE	RACE	SEX	AGE	DOB
ARRESTEE NAME (LAST, FIRST MIDDLE)	RES ADD: / CITY & STATE:	RACE	SEX	AGE	DOB

Ms. O'Donnell stated he never once mentioned to her that he couldn't possess any firearms but she didn't think he could because he was on probation from a domestic violence complaint she had pressed against him in September of 2000.

Ms. O'Donnell said she never witnessed Patane shoot the weapon but he had asked several times where he could go to shoot the handgun. She had shot several firearms when she was younger and gave him a few ideas but she was never with him when he fired the weapon. One day he had told her he found a place to shoot the firearm and had just got back from shooting the pistol.

According to Ms. O'Donnell, Patane had been in possession of another handgun - .357 pistol that had been stolen from him by some kids. The Colorado Springs Police Department had recovered the pistol and notified Patane that it was recovered. Patane had asked her several times to go down to the police station and state the .357 pistol was hers and get it out of evidence for him. She refused but went down to the police station one time and told the investigating officer everything about the ownership of the .357 weapon. She couldn't remember the case number or the officer she had talked to about the .357 handgun. The .357 pistol was never returned to Patane or Ms. O'Donnell.

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Ms. O'Donnell knew Patane was on probation for the domestic violence complaint she had completed in September of 2000. She was the victim of a 3rd degree assault by Patane and she thought he was on probation for at least two (2) years.

When asked where Patane stored the Glock .40 caliber pistol, she stated he would usually keep it with him at all times. He would keep it in his waistband, in whatever car he was driving or at his house.

DETECTIVE STATEMENT CONT'D:

After the interview, Ms. O'Donnell told me Officer Fox 1750P was at her house taking a violation of a temporary restraining order complaint. I spoke with Officer Fox and she told me she would have a signed complaint for Patane's arrest for violation of the temporary restraining order. Officer Fox also stated he worked at Phil Long Ford until 5:00 p.m. located in Motor City.

ATF RAC Marianos and I responded to Phil Long Ford located at 1212 Motor City Drive and according to one of the supervisor's, Patane had already left for the day. I informed Officer Fox of this and we responded to his home located at 837 E. Vermijo.

On 06-06-01 at approximately 1700hr Officer Fox and I arrived at the location of 837 E. Vermijo to contact Patane. Officer Fox was able to place Patane under arrest without incident inside the home of Patane. Once under arrest I spoke with Patane just outside his house regarding the firearm Ms. O'Donnell had mentioned.

000006 (108)

UCR DISPOSITION	OFFICER NAME/NUMBER	SUPERVISOR	DATE	PAGE
CLEAR BY ARREST	DET. J. BENNER 1480P	SGT. REISLER 379P	7-Jun-01	2 OF 3

INVESTIGATIONS

COLORADO SPRINGS POLICE DEPARTMENT
CONTINUATION/SUPPLEMENTAL REPORT

CASE REPORT NUMBER: 01-19192

CHARGE	STATUTE NUMBER	UCR RECLASSIFICATION TO	UCR CODE
POSSESSION OF WEAPONS BY PREVIOUS OFFENDERS	18-12-108		

VICTIM'S NAME (LAST, FIRST MIDDLE)	DATE OF THIS REPORT
STATE OF COLORADO	06-07-01

ARRESTEE NAME (LAST, FIRST MIDDLE)	RES ADD: / CITY & STATE:	RACE	SEX	AGE	DOB

ARRESTEE NAME (LAST, FIRST MIDDLE)	RES ADD: / CITY & STATE:	RACE	SEX	AGE	DOB

DETECTIVE STATEMENT CONT'D:

immediately started to read Patane his Miranda Warning, at which time Patane waived his rights stating, "I now my rights." I asked him if he wanted to talk to me about a firearm he may have in his possession. He tated, "The .357 is in police custody already." I told him I was more interested in the Glock handgun he was in is possession that he had bought at a gun show. He told me he wasn't sure if he should show me where the un was because he didn't want it taken from him. I explained to Patane he was being cooperative to this point, nd to get in front of the domestic violence case, he needed to be truthful regarding the location of his firearm. t that point he stated, "The Glock .40 caliber pistol is in my bedroom on the wooden shelf against the wall in a ray case.

asked him if he would give me verbal permission to go inside his bedroom (which was the southeast bedroom the house) to retrieve the pistol and he said, "yes". I obtained the pistol from the second shelf from the top of s wooden bookshelf behind some magazines. It was inside a gray gun case. The gun was a Glock .40 caliber ', model 22, serial #RE377. A magazine was inside the pistol with ten (10) .40 caliber rounds inside the agazine. There was a clear plastic bag with thirty-one (31) .40 caliber loose bullets contained inside that was und also inside the gun case.

fter recovering the firearm through verbal consent, I asked him where he had bought the gun. He stated he ought the above stated gun at a gun show but couldn't remember exactly how much he paid for the gun. He ated he had shot it a few time but not many. I asked him if Ms. O'Donnell had shot the gun and he stated, he did not". I asked if he had used the gun in the commission of any crimes and he stated "no". I then dvised Patane I would still be investigating this matter but he was not being arrested for the possession of the earm at this time.

fficer Fox then transported Patane down to CJC for the violation of a temporary restraining order. The Glock 0 caliber pistol, the magazine, the bullets and the case were placed into evidence.

n June 07. 2001, ATF RAC Marianos and I met with El Paso County Probation Officer Janine Sunyay, whom is sponsible for the supervision of Patane. During this meeting Sunyay identified a picture of Patane under aster Names Index #000286225. Sunyay stated and provided a Probation Department document in the name Samuel Patane. It stated Patane was under probation for case number 97M5969, and was under deferred dgment for a felony under case number 98CR64-5.

n that same date I received certified copies of conviction for Samuel Patane, DOB: 11-13-49 for criminal case mbers 97M5969, third degree assault, and for 98CR64-5, possession of a controlled substance.

information was referred to ATF RAC Marianos for pending federal charges and further investigation.

further

000097

(109)

DISPOSITION	OFFICER NAME/NUMBER	SUPERVISOR	DATE	PAGE 3 OF 3
LEAD BY ARREST	DET. J. BENNER 1450P	SGT. REISLER 379P	7-Jun-01	

INVESTIGATIONS

STATE OF WISCONSIN, CIRCUIT COURT, **VILAS COUNTY**

☑ State of Wisconsin

vs.

LINDA S. O'DONNELL
Defendant

07/07/1957
Date of Birth

Bail/Bond
☑ Cash Bail ☐ Signature Bond
☐ Surety bond ☐ Property Bond

Case No. 01CM

Concealed Weapon; Crim. Trespass; Misd. theft; Crim. Damage

A. Monetary Conditions of Release

1. ☒ Defendant shall deposit cash bail of $ 1000.00. Date deposited 04/11/01.
Any fines, forfeitures or costs imposed against the defendant shall be paid out of the cash bail without further notice.
2. ☐ Defendant: and/or ☐ Surety:
Guarantees compliance with the terms of this bond by pledging $_____
and understands that if the defendant does not comply with the terms of this bond, the bond will be forfeited and the defendant and/or surety may be ordered to pay the amount of the bond. Approved surety name(s): _____
3. ☐ Defendant: and/or ☐ Surety:
Guarantees compliance with the terms of this bond by pledging $_____ in personal or real property (**description attached**) and understands that if the defendant does not comply with the terms of this bond, the bond will be forfeited and the defendant and/or surety may be required to surrender the property. Approved surety name(s): _____

B. Additional Conditions of Release

- Defendant shall appear on all court dates.
- Defendant shall give written notice to the Clerk of this Court within 48 hours of any change of address or telephone number.
- Defendant shall not commit any crime.
- Defendant shall neither directly nor indirectly threaten, harass, intimidate or otherwise interfere with victims or witnesses in this action.

Other: No contact w/ Jesse Wagner nor Jean Byszek
No possession of weapon

☐ See Attached.

This bond is in effect until disposition or until modified by the court.

The sheriff shall detain the defendant in custody until the defendant has signed the bond, complied with the monetary conditions of release, or is otherwise discharged.

I have received a copy of this bond and I agree to its terms. I understand that my next court date is:

Circuit Court Location	Date	Time
Vilas Co. Circuit Court, 330 Court St., Eagle River, WI 54521	6/6/01	9:00AM

Defendant's Signature	Date	Defendant's Address	Telephone Number
Linda S. O'Donnell	4/11/01	852 Calvert Ave Colo Spgs 80904	719 338-85
Surety's Signature	**Date**	**Surety's Address**	**Telephone Number**
Frank [illegible]	4-11-01	COLO SPRINGS PO BOX 7094	719 331-4705

☒ I have furnished the defendant with a copy of this document.

[illegible]
Signature

Correctional Officer C027
Title

4-11-01
Date

DEFENDANT'S EXHIBIT
D
01-CR-228-WM
witness

CR-223, 4/00 Bail/Bond

§§66.114, 345.32, 940.49, ch. 969, Wisconsin Statutes

This form shall not be modified. It may be supplemented with additional material.

State of Wisconsin **Circuit Court** **Vilas County**

STATE OF WISCONSIN

Plaintiff,

-VS-

DA Case No.: 2001VI000268
Assigned DA/ADA: Albert D Moustakis
Agency Case No.: 01-002907

Court Case No.: 01-CM- 129
ATN:

Linda S O'Donnell
822 Calvert Avenue
Colorado Springs, CO 80904
DOB: 07/07/1957

Defendant,

Criminal Complaint

Complainant, on information and belief, being first duly sworn, upon oath, states that the above named defendant, in the County of Vilas, State of Wisconsin:

Count 1: CARRYING A CONCEALED WEAPON

The above-named defendant on or about Saturday, April 07, 2001, in the Town of Manitowish Waters, Vilas County, Wisconsin, not being a peace officer, did go armed with a concealed and dangerous weapon, to wit: a .38 handgun, contrary to sec. 941.23, 939.51(3)(a) Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than nine (9) months, or both.

Count 2: CRIMINAL TRESPASS

The above-named defendant on or about Saturday, April 07, 2001, in the Town of Manitowish Waters, Vilas County, Wisconsin, did intentionally enter the dwelling of Jeannine M. Byczek, without the consent of some person lawfully upon the premises, under circumstances tending to provoke a breach of the peace, contrary to sec. 943.14, 939.51(3)(a) Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than nine (9) months, or both.

Count 3: MISDEMEANOR THEFT

The above-named defendant on or about Saturday, April 07, 2001, in the Town of Manitowish Waters, Vilas County, Wisconsin, did intentionally take and carry away the movable property of Jeannine M Byczek and Jerry E. Wagner, without consent and with intent to permanently deprive the owner of possession of the property, contrary to sec. 943.20(1)(a) and (3)(a), 939.51(3)(a) Wis. Stats., a Class A Misdemeanor, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than nine (9) months, or both.

Count 4: CRIMINAL DAMAGE

The above-named defendant on or about Saturday, April 07, 2001, in the Town of Manitowish Waters, Vilas County, Wisconsin, did unlawfully, intentionally cause damage to the physical property of Jerry Wagner, without consent, contrary to Sec. 943.01(1), Wis.Stats. Upon conviction of this charge, a Class A misdemeanor, the maximum penalty is a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both. Sec. 939.51(3)(a), Wis.Stats.

And prays that said defendant be dealt with according to law; and that the basis for the complainant's charge of such offenses is:

PROBABLE CAUSE:

Complainant relies on the official officer's reports of Deputy Mark A. Collins and Deputy Petreikis responded to assist Lt. Varebrook and Deputy Duwe, all of the Vilas County Sheriff's Department. The authors are sworn members of law enforcement. I have worked with the officers before and found them to be truthful and reliable. I believe the reports were generated in the scope of their employment and in the ordinary course of business of law enforcement. I believe the reports are truthful and reliable as records kept in the ordinary course of business. I have used reports of this kind and found them to be truthful and reliable in the past.

On April 7, 2001, Deputy Collins and Deputy Petreikis responded to assist Lt. Varebrook and Deputy Duwe, all of the Vilas County Sheriff's Department to a disturbance call at 27 Townline Road in Manitowish Waters, Wisconsin. This occurrence was at the residence of Jeannine Byczek and Gerald Wagner.

Mr. Wagner and Ms. Byczek returned to their home of 27 Townline Road between 7:30 – 8:00 p.m. that evening to discover that a 1988 Buick Century station wagon titled in Ms. Byczek's station wagon was being driven by Linda O'Donnell. Ms. Byczek stopped in the middle of the driveway to block Ms. O'Donnell's driving out of the yard. While attempting to leave with the station wagon, O'Donnell hit another car. A verbal and physical confrontation ensued involving O'Donnell, Wagner and Byczek. After officer's arrived at the scene, Linda S. O'Donnell exited a silver-colored Plymouth she arrived to the residence in and immediately began to argue with Ms. Byczek. The deputy's decided to separate the parties. Later, deputies performed a consensual search of the vehicle used by O'Donnell. Lt. Varebrook found a loaded 38-caliber Special Revolver handgun, with silver in color and a black handle underneath the driver's seat. This gun was not cased. It was later identified at the Vilas County Sheriff's Department that this gun belonged to Linda S. O'Donnell.

As Ms. Byczek and Mr. Wagner entered into the house they discovered that there was forced entry into the house at the rear upper entrance near the dining room and kitchen. The door to the house was closed and secured with a chain lock. There were pry marks on the wooden frame and door assembly near the bolt and strike plate area. They were

instructed to prepare a list of items stolen and/or missing. (See attached sheet containing information that Officer Duwe received from Ms. Byczek and Mr. Wagner indicating the items that were stolen and/or missing from the residence.

When interviewed, O'Donnell admitted to entering the house and taking property out of the home. Wagner indicated that many of the items taken were taken from his bedroom and did not belong to his son. Wagner indicated that he did not give anyone permission to enter his home or take any items from that home or damage and of his property. Jarread Wagner, the son of Jerry Wagner indicated to Helga Low of the Vilas County Social services department that his mother, Linda O'Donnell forcibly entered the Wagner residence.

I believe the statements of Jarread Wagner, an ordinary citizen, as contained in the officer's report, are truthful and reliable as a first-hand recollection of the acts complained of.

I believe the statements of Jerry Wagner, an ordinary citizen, as contained in the officer's report, are truthful and reliable as a victim of the crime complained of.

I believe some statements of Linda S O'Donnell are truthful and reliable since she made them voluntarily to law enforcement and they constitute admissions against her penal interest.

Copies of all other pertinent documents are attached to this complaint and incorporated herein as if fully set forth.

Based on the foregoing, the complainant believes this complaint to be true and correct.

Subscribed and sworn to before me,
and approved for filing on:

April 10, 2001

Complainant

Albert D Moustakis
District Attorney
State Bar No. 1018354

ITEMS REPORTED AS STOLEN AND/OR MISSING

WISCONSIN MOTOR VEHICLE TITLES —

TAKEN FROM ICE CABINET N LIVING OOM

- 96 FORD EXPLORER (J. BYCZEK)
- 91 DODGE TRK (J. BYCZEK)
- 99 PONT GRAND AM (J. BYCZEK)
- 80 HARLEY DAVIDSON M/C (~~J. BYCZEK~~) (G. WAGNER)
- 79 HARLEY DAVIDSON M/C (G. WAGNER)
- 77 FORD VAN (G. WAGNER)
- 62 MG TD-4 (G. WAGNER)

TAKEN FROM ICE CABINET N LIVING M

BIRTH CERTIFICATES + SSAN CARDS

ADENA L. BYCZEK — JEANNINE M. BYCZEK

GERALD E. WAGNER — JARREAD W. WAGNER.

TAKEN FROM GARAGE —

① HARLEY DAVIDSON "FAT BOY" FENDER $65.00
GREEN PLASTIC.

① PLASTIC TOTE BOX w/ MISC. CONTENTS (UNKNOWN) $5.00

⑩ CARDBOARD BOXES w/ MISC ITEMS - MOSTLY ITEMS OF CLOTHING (~~JARREAD'S~~), ETC. FROM ~~JARREAD'S~~ ROOM.

89 DODGE PKP TRK (PARKED ON DRIVEWAY NEAR HOUSE)
RIGHT FRONT TIRE DEFLATED - MAY POSSIBLY HAVE BEEN PUNCTURED.
ASSORTED TOOLS FROM BOX MOUNTED IN PICKUP BED STILL IN ABOUT - UNKNOWN IF ANYTHING MISSING.

ITEMS TAKEN FROM JARREAD'S BEDROOM —

① 13" ORION COLOR TELEVISION, BLK PLASTIC CABINET / SER + MOD # UNKNOWN $100.00

① FIVE KNIFE COLLECTION — (MFG. UNK.) WOODEN DISPLAY CASE W/ CLEAR PLASTIC WINDOW. 5 - ASSORTED STRAIGHT (FIXED) BLADES $100.00

① THREE KNIFE COLLECTION — (MFG. UNK) WOODEN DISPLAY CASE W/ 3 POCKET-TYPE FOLDING KNIVES. $60.00
ONE KNIFE HAS EAGLE + ONE A WOLF SCENE ON HANDLE.

① 15" (APPROX.) STRAIGHT KNIFE ON A WOODEN PLAQUE DISPLAY. (MFG. UNK) KNIFE BLADE IS SPLIT, W/ BLACK COMPOSITE HANDLE. $75.00

KNIFE DISPLAYS WERE TAKEN OFF THE WALL WHERE THEY HAD BEEN DISPLAYED.

DAMAGE TO 2ND LEVEL ENTRANCE DOOR TO RESIDENCE, NORTH SIDE OF BLDG. PRYING CAUSED SOME SPLINTERING TO DOOR + WOODEN TRIM / FRAME. CHECK CHAIN ALSO DAMAGED.
EST REPAIR @ APPROX $50.00

000013

Supreme Court, U.S.
FILED
JUL 14 2003
OFFICE OF THE CLERK

No. 02-1183

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SAMUEL FRANCIS PATANE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a failure to give a suspect the warnings prescribed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), requires the suppression of physical evidence derived from the suspect's unwarned but voluntary statement.

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In the Supreme Court of the United States

No. 02-1183

UNITED STATES OF AMERICA, PETITIONER

v.

SAMUEL FRANCIS PATANE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 304 F.3d 1013.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2002. A petition for rehearing was denied on December 9, 2002 (Pet. App. 34a). The petition for a writ of certiorari was filed on February 12, 2003, and was granted on April 21, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part that "[n]o person shall

* * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

STATEMENT

On June 19, 2001, a grand jury sitting in the United States District Court for the District of Colorado indicted respondent for possession of a firearm after having previously been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). The district court granted respondent's motion to suppress the firearm. The court of appeals affirmed. Pet. App. 1a-33a.

1. On June 6, 2001, Officer Tracy Fox of the Colorado Springs Police Department arrested respondent outside his residence for violating a domestic violence restraining order. Shortly thereafter, Detective Josh Benner, who was part of a gun interdiction task force of the Bureau of Alcohol, Tobacco, and Firearms and who had been told by a probation officer that respondent was a convicted felon and possessed a Glock .40 pistol, began reading respondent his *Miranda* rights. After he was advised of his right to remain silent, respondent told the detective that he knew his rights. At that point, Detective Benner stopped reading the *Miranda* warnings. Pet. App. 2a-4a; see J.A. 32, 41, 47-48.

Detective Benner asked respondent what guns he owned, and respondent replied that a .357 was already in police custody. Benner asked respondent about the Glock pistol, and respondent said that the pistol was on a wooden shelf in his bedroom. Respondent gave Benner permission to retrieve the pistol, and Benner went into the residence, found the pistol on the shelf, and seized it. Pet. App. 4a.

2. The district court granted respondent's motion to suppress the firearm, ruling that the police officers lacked probable cause to arrest respondent for violating the domestic violence restraining order. J.A. 78-88. The court did not rule on respondent's alternative argument that the firearm should be suppressed as the fruit of an unwarned statement by respondent. J.A. 86. The government appealed.

3. The court of appeals affirmed. Pet. App. 1a-33a. The court reversed the district court's ruling that respondent's arrest was not supported by probable cause. *Id.* at 5a-10a. The court nevertheless affirmed the district court's suppression order on the alternative ground that the firearm was inadmissible as the fruit of a statement obtained without *Miranda* warnings. *Id.* at 10a-33a.

The court acknowledged that this Court in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), and *Oregon* v. *Elstad*, 470 U.S. 298 (1985), had "declined to apply the fruits of the poisonous tree doctrine of *Wong Sun* v. *United States*, 371 U.S. 471, 485 (1963), to suppress evidence obtained from an un-Mirandized confession." Pet. App. 11a-12a. The court also acknowledged that in *United States* v. *McCurdy*, 40 F.3d 1111 (10th Cir. 1994), it had previously read *Elstad* and *Tucker* to prohibit the suppression of physical evidence obtained as a result of an unwarned statement except when the statement was not voluntary. Pet. App. 19a. The court concluded, however, that this Court's holding in *Dickerson* v. *United States*, 530 U.S. 428 (2000), that *Miranda* is a constitutional rule "undermined the logic underlying *Tucker* and *Elstad*." Pet. App. 13a. On that ground, the court held that it was not bound by its prior decision in *McCurdy*. *Id.* at 19a-20a.

Examining the issue anew, the court concluded that neither *Elstad* nor *Tucker* supported the proposition that *Miranda* permits the introduction of derivative physical evidence when the defendant's unwarned statement was voluntary. Pet. App. 15a-21a. The court emphasized that *Tucker* involved an interrogation that occurred before *Miranda* was decided, and the court read *Tucker* as resting "largely on [the] conclusion that excluding the fruits of [the unwarned] confession would have minimal prophylactic effect because the officers were acting in complete good faith under prevailing pre-*Miranda* law." *Id.* at 13a. The court distinguished *Elstad* on the ground that the evidence derived from the unwarned statement in *Elstad*—subsequent voluntary statements made by the defendant after the administration of *Miranda* warnings—was a product of the defendant's volition. *Id.* at 16a-18a.

The court acknowledged that "[c]ourts applying *Dickerson* have split on the proper application of *Wong Sun* to the physical fruits of a *Miranda* violation." Pet. App. 20a. Rejecting the approaches of the Third Circuit in *United States* v. *DeSumma*, 272 F.3d 176 (2001), cert. denied, 535 U.S. 1028 (2002), and the Fourth Circuit in *United States* v. *Sterling*, 283 F.3d 216, cert. denied, 535 U.S. 931 (2002), the court decided that a deterrence rationale required the suppression of physical evidence derived from statements made by a suspect who had not been given *Miranda* warnings. Pet. App. 21a-28a. Rejecting the approach of the First Circuit in *United States* v. *Faulkingham*, 295 F.3d 85 (2002), petition for cert. pending, No. 02-7385 (filed Oct. 7, 2002), the court also decided that the suppression of derivative physical evidence was required even when a police officer's failure to give *Miranda* warnings was negligent rather than intentional. Pet. App. 28a-33a. The court thus held that physical evidence derived from a suspect's unwarned statement must always be suppressed, regardless of its voluntariness, because *Miranda* is a constitutional rule.

SUMMARY OF ARGUMENT

Miranda does not require the suppression of physical evidence derived from a voluntary statement taken without *Miranda* warnings. Neither the rationale of *Miranda*, nor this Court's recognition that it is a constitutional rule, supports such an extension of the *Miranda* rule. To the contrary, any such extension would depart from the rule's purpose and would impose unnecessary costs on the truthseeking function of criminal trials.

I. The core right in the Self-Incrimination Clause is the privilege of a criminal defendant not to be compelled to testify against himself at a criminal trial. To effectuate that rule, the privilege may be asserted not only at the criminal trial, but also in pretrial or other proceedings. An analogous principle protects the defendant against having compelled incriminating statements made to the police during an investigation used against him at trial. In all of those contexts, the Self-Incrimination Clause, as its text implies, protects individuals only from being *compelled* to speak; the Clause is not concerned with voluntary, though incriminating, statements.

The *Miranda* rule was developed to protect the core Fifth Amendment right. *Miranda* was a response to this Court's decades-long experience with case-by-case adjudication under the Due Process Clause of whether, on the facts of particular cases, the defendants had in fact been compelled to speak during custodial interrogation. This Court concluded in *Miranda* that the

due process test had resulted in an unacceptably high risk that involuntary confessions will not be detected and will be admitted against the defendant. To reduce that risk, *Miranda* excludes unwarned statements in the prosecution's case in chief.

A failure to administer *Miranda* warnings, however, does not establish that actual compulsion has been applied to a defendant. Voluntary statements taken without full compliance with the *Miranda* procedures may be used for impeachment of a testifying defendant or where the failure to give warnings was justified by public safety considerations. Similarly, the Court has not required the suppression of derivative *testimonial* evidence solely because a statement was taken without warnings. See, *e.g.*, *Oregon* v. *Elstad*, 470 U.S. 298 (1985). Rather than apply a Fourth Amendment fruit-of-the-poisonous-tree analysis, *Elstad* recognized that Fifth Amendment *Miranda* analysis does not require or justify suppression of derivative evidence when the unwarned statement was not, in fact, coerced.

II. Under those principles, physical evidence discovered as a result of a voluntary unwarned statement should not be excluded from the government's case.

First, once unwarned statements are excluded from the prosecution's case in chief, the defendant has received safeguards against the risk that the Fifth Amendment will be violated by introduction of his compelled statements. The defendant's core Fifth Amendment right is therefore protected. There is no justification for further applications of the *Miranda* prophylaxis, which conclusively presumes compulsion based on the omission of warnings.

Second, extension of the *Miranda* rule to physical evidence uncovered following the taking of a voluntary

unwarned statement would impose an unacceptably high cost on the truthseeking function of the criminal trial. In this case, for example, exclusion of the gun would impose an insuperable barrier to prosecution. Providing respondent with effective immunity from prosecution is not necessary to provide protection for his core Fifth Amendment right.

Third, there is no sufficient policy reason to justify the imposition of those high costs. The Self-Incrimination Clause is concerned with compulsion to provide testimony. It is not directly concerned with physical evidence. In the context of compelled immunized testimony, the Court has required the exclusion of evidence indirectly derived from the compelled statements. *Kastigar* v. *United States*, 406 U.S. 441 (1972). But in the *Miranda* context, the fact that police officers acquired a statement without the issuance of the warnings does not show that actual compulsion was applied.

A deterrence rationale also provides no support for extending the *Miranda* rule to physical evidence. The Constitution does not forbid the police from taking unwarned statements. Rather, the Fifth Amendment confers a trial right, and *Miranda* protects against violation of that right by excluding unwarned statements. In that respect, *Miranda* differs from the Fourth Amendment, where the exclusionary rule (including its "fruits" component, *Wong Sun* v. *United States*, 371 U.S. 471 (1963)) cannot prevent a violation and seeks to achieve wholly prospective results. And even if it were thought advisable to provide an incentive for police officers to give *Miranda* warnings, ample incentive already exists as a result of the rule requiring suppression of the unwarned statement itself.

Finally, exclusion of unwarned statements, which might have been coerced, can be said to protect the fairness of the trial by excluding a possibly unreliable confession. But such reliability concerns have no force with respect to unquestionably reliable physical evidence discovered as a result of an unwarned statements.

III. The court of appeals found support for extending *Miranda* to physical evidence based on this Court's decision in *Dickerson* v. *United States* 530 U.S. 428 (2000), which recognized that *Miranda* is a constitutional rule. Nothing in the recognition that *Miranda* is a constitutional rule, however, suggests that the scope of that rule should be broadened. To the contrary, the Court's decision in *Dickerson* was itself based on principles of stare decisis, and the *Dickerson* opinion relied on existing limits to the *Miranda* rule as a basis for declining to overrule its precedent.

Nor does *Dickerson* undermine the analytical foundations of cases such as *Oregon* v. *Elstad*, *supra*. *Dickerson*'s recognition that the *Miranda* rule is constitutional in origin does not mean that a failure to give warnings is equivalent to actual coercion. Instead, *Miranda*—both before and after *Dickerson*—is a prophylactic constitutional rule, *i.e.*, a safeguard to protect the core constitutional right of a defendant not to be a witness against himself. *Dickerson*'s analysis therefore provides no basis for a novel extension of the *Miranda* rule to require automatic exclusion of physical evidence derived from unwarned statements.

ARGUMENT

THE FIFTH AMENDMENT DOES NOT REQUIRE THE EXCLUSION OF NONTESTIMONIAL PHYSICAL EVIDENCE DERIVED FROM A SUSPECT'S UNWARNED, VOLUNTARY STATEMENT

After the police arrested respondent, one officer began to inform him of his *Miranda* rights in order to ask him questions about the location of a gun. The officer told respondent that he had the right to remain silent. Before the officer could complete the rest of the warnings, respondent interrupted and said he knew his rights. J.A. 46-47. In response to the officer's questions, respondent then informed the officer that a Glock pistol was in his bedroom, and he gave the officer consent to retrieve it. J.A. 42. The officer did so. J.A. 42. Even though there is every reason to conclude that respondent's statements were "voluntary" in traditional due process analysis, there is no dispute that, as a result of the officer's failure to complete the *Miranda* warnings, respondent's statements are inadmissible in the government's case in chief. The question is whether the giving of incomplete *Miranda* warnings, by itself, constitutes a constitutional violation that requires the suppression of the Glock pistol under the fruit-of-the-poisonous-tree doctrine announced in *Wong Sun* v. *United States*, 371 U.S. 471 (1963). The court of appeals' holding that suppression of the gun is mandated fundamentally misconceives the role of *Miranda* in protecting the Fifth Amendment privilege against compelled self-incrimination.

Miranda is "a constitutional decision of this Court," *Dickerson* v. *United States*, 530 U.S. 428, 432 (2000), but the nature of the constitutional rule in *Miranda* is crucial in assessing its implications. The taking of a

statement without the warnings set forth in *Miranda* does not, by itself, constitute compulsion within the meaning of the Fifth Amendment. Instead, *Miranda* sets up an evidentiary rule designed to prevent the *risk* that an actually compelled statement may be admitted into the government's case in chief. *Miranda* thus creates a limited exclusionary rule for unwarned statements themselves. The admission of physical evidence derived from voluntary unwarned statements, however, does not present the risk that an actually compelled statement will be admitted. Accordingly, such physical evidence is not subject to exclusion based solely on the failure to give the warnings. To suppress such physical evidence would be to extend the *Miranda* rule far beyond its purpose, at a high cost to the truth-seeking function of a criminal trial, and with no sufficient offsetting benefits.

Dickerson itself made clear that the particularized rules adopted by this Court to refine the meaning of *Miranda* are equally part of the constitutional doctrine in this area. 530 U.S. at 441. The Court specifically noted that it had refused "to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases" to situations involving voluntary unwarned statements under *Miranda*. *Ibid.* (citing *Oregon* v. *Elstad*, 470 U.S. 298 (1985)). Just as the Court has refused to apply the fruit-of-the-poisonous-tree doctrine of *Wong Sun* to suppress testimonial evidence obtained from unwarned statements, *Elstad*; *Michigan* v. *Tucker*, 417 U.S. 433 (1974), it should hold here that physical evidence obtained as a result of a voluntary, but unwarned statement is not subject to suppression under *Miranda*. The complete and sufficient response to the failure to give *Miranda* warnings is to exclude

the ensuing statement from the government's case in chief.

I. *MIRANDA* IS AN EXCLUSIONARY RULE THAT PROTECTS A DEFENDANT'S FIFTH AMENDMENT PRIVILEGE NOT TO HAVE COMPELLED STATEMENTS INTRODUCED AGAINST HIM AT TRIAL

The starting point for analysis of whether the failure to give *Miranda* warnings requires suppression of physical evidence derived from the suspect's unwarned statements is a description of the Fifth Amendment rights that *Miranda* protects, as well as the way in which it protects them. That description makes clear that a failure to give *Miranda* warnings, by itself, cannot be regarded as a violation of the Self-Incrimination Clause's provision that "[n]o person shall * * * be compelled in any criminal case to be a witness against himself." Instead, *Miranda* establishes a constitutionally based judicial device to protect against the risk that a compelled statement would be mistakenly admitted in a criminal case.

A. The Core Of The Fifth Amendment's Protection Is The Exclusion Of A Defendant's Compelled Incriminating Statements At A Criminal Trial

The core protection afforded by the Fifth Amendment is that a criminal defendant cannot be compelled to testify against himself at a criminal trial. See *Chavez* v. *Martinez*, 123 S. Ct. 1994, 2000-2001 (2003) (plurality opinion); *id.* at 2006 (Souter, J., concurring) ("[t]he text of the Fifth Amendment * * * focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony, and the core of the guarantee against compelled self-incrimination is the exclusion of any such evidence"). No penalty may be imposed on a defendant for refusing to testify at a criminal trial. *Griffin* v.

California, 380 U.S. 609, 614 (1965) (prohibiting comments by court or prosecutor on a defendant's refusal to testify). The privilege permits a defendant at a criminal trial to decline even to be sworn as a witness. *Wilson* v. *United States*, 149 U.S. 60, 66 (1893); see *Griffin*, 380 U.S. at 613 (noting that *Wilson*, though based on a statute, states the constitutional rule). At the defendant's request, a judge must instruct the jury not to draw an adverse inference from a defendant's failure to testify. *Carter* v. *Kentucky*, 450 U.S. 288 (1981).

1. To effectuate the core Fifth Amendment privilege, the Court adopted a related rule allowing the privilege to be asserted in proceedings outside a criminal trial. "It has long been held that [the prohibition of the Self-Incrimination Clause] not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Minnesota* v. *Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973)); see *Michigan* v. *Tucker*, 417 U.S. 433, 440 (1974) ("Although the constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited."). Accordingly, if a person can "demonstrate that any testimony he might give * * * could be used in a criminal proceeding against him brought by the * * * United States or one of the States, he would be entitled to invoke the privilege." *United States* v. *Balsys*, 524 U.S. 666, 671-672 (1998).

That right is closely connected to the core protection of the Self-Incrimination Clause. Both at trial and in a pretrial proceeding, the subject of the inquiry, having been placed under oath, is subject to "the cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964). The "natural concern" of providing protection to a potential defendant "is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage." *Michigan* v. *Tucker*, 417 U.S. at 440-441.

2. Trials, not police interrogations, are at the core of the Fifth Amendment privilege. Nonetheless, the privilege has also been extended to protect a person from having compelled incriminating statements made to the police in an investigation used against him at trial. *Miranda* v. *Arizona*, 384 U.S. 436, 461, 478 (1966); see also *Wan* v. *United States*, 266 U.S. 1, 14 (1924); *Bram* v. *United States*, 168 U.S. 532, 542 (1897). The justification is similar to the justification for extending the privilege to formal proceedings outside of a criminal trial. If a person can be compelled through police pressure (rather than the formal sanction of contempt) to answer police questions during an investigation, his opportunity to assert the privilege at trial and refuse to testify will be compromised. The extension of the privilege to police questioning provides doctrinally distinct, but parallel protection for the defendant to that provided by the longstanding due process rule precluding admission into evidence of involuntary statements made during police interrogation. See *Dickerson*, 530 U.S. at 433-435; *Brown* v. *Mississippi*, 297 U.S. 278 (1936).

3. In all of these contexts, the explicit textual mandate of the Fifth Amendment requires that, for the

Clause to apply, the defendant must be "compelled" to speak. "Volunteered statements of any kind are not barred by the Fifth Amendment," *Miranda*, 384 U.S. at 478, nor are statements that are not the product of pressures emanating from official coercion, *Colorado* v. *Connelly*, 479 U.S. 157, 170 (1986) ("The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion."). See also *Michigan* v. *Tucker*, 417 U.S. 433, 448 (1974) ("Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be *compelled* * * *."). The literal language of the Self-Incrimination Clause does not establish *how* coercion is to be proved, or whether, and under what circumstances, it may be presumed. Courts may craft "complementary" rules of adjudication that facilitate protection of the privilege when "the judicial capacity to protect" the core Fifth Amendment guarantee would be seriously jeopardized without them. *Chavez*, 123 S. Ct. at 2007 (Souter, J., concurring). But the Fifth Amendment is not implicated in the absence of coercion or its substantial risk.

B. *Miranda* Created A Rule Of Exclusion To Protect The Defendant's Core Fifth Amendment Right Not To Have His Compelled Statements Used Against Him At Trial

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court provided additional protection for the Fifth Amendment in the context of custodial interrogation, beyond the traditional due process test that required proof that, in the totality of the circumstances, any confession had to be voluntary to be admissible against the defendant. *Miranda* held that statements made by a defendant in response to custodial interrogation are

not generally admissible against him in the government's case in chief unless the defendant voluntarily and knowingly agreed to speak after being administered what have become known as *Miranda* warnings. Those warnings are that a defendant "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479; *Dickerson*, 530 U.S. at 435.

The *Miranda* rule was adopted to provide "adequate safeguards" for Fifth Amendment rights. 384 U.S. at 457; see also *id.* at 491 (Court's opinion announced "constitutional standards for *protection* of the privilege") (emphasis added). In numerous cases in the thirty years before *Miranda*, the Court had used the "totality of the circumstances" test to determine whether a confession made in the course of custodial interrogation was voluntary under the Due Process Clause and therefore admissible in evidence. See *Dickerson*, 530 U.S. at 434-435. But because "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements," *id.* at 435, the *Miranda* Court found that "reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt."[1] *Id.*

[1] The risk exists for several reasons. First, the legal standards for determining involuntariness require a fact-specific assessment in each case of all of the circumstances of the interrogation as applied to a particular subject—an inquiry for which precedent may not afford adequate guidance. *Dickerson*, 530 U.S. at 444. Second, courts may experience an "inevitable and understandable

at 442 (citation omitted). The Court concluded in *Miranda* that the Fifth Amendment right should be protected by requiring, before a confession could be offered in the government's case in chief, that the government demonstrate that it was preceded by the *Miranda* warnings.[2]

Miranda's rule does not result in a complete, substitute definition for the compulsion required to trigger the Fifth Amendment. Even if the defendant receives *Miranda* warnings and speaks, he may still assert that his statements were involuntary and thus inadmissible. *Dickerson*, 530 U.S. at 444. Nonetheless, the *Miranda* rule does "simplify subsequent inquiry into voluntariness," *Chavez*, 123 S. Ct. at 2007 (Souter, J., concurring), and it is therefore likely to be effective in the vast run of cases to ensure that involuntary statements are not admitted in the government's case in chief. See *Berkemer* v. *McCarty*, 468 U.S. 420, 433 n.20 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.").[3]

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reluctance to exclude an otherwise reliable admission of guilt," *Miller* v. *Fenton*, 474 U.S. 104, 117 (1985), and thus may err on the side of admission of statements even when they should be excluded.

[2] *Miranda* left open the possibility that legislatures might be able to devise solutions that did not involve the warnings if those solutions were "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." 384 U.S. at 467; see *Dickerson*, 530 U.S. at 440-442. That option is not implicated in this case.

[3] See also *Oregon* v. *Elstad*, 470 U.S. at 318 ("The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative [on the voluntariness of his statements]."); *Colorado* v. *Spring*, 479 U.S. 564, 576 (1987) ("Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled.") (citation omitted).

At the same time, because *Miranda* simplifies litigation and protects the Fifth Amendment privilege by casting a wider net than the definition of compulsion might require if applied case-by-case, it cannot be seen as playing the same role in criminal cases as an actual determination of compulsion. See *Chavez*, 123 S. Ct. at 2004 (plurality opinion) ("We have * * * established the *Miranda* exclusionary rule as a prophylactic measure to prevent violations of the right protected by the text of the Self-Incrimination Clause."); *id.* at 2007 (Souter, J., concurring in the judgment) (*Miranda* rule is "outside the Fifth Amendment's core, * * * expressing a judgment that the core guarantee, or the judicial capacity to protect it, would be placed at some risk in the absence of such complementary protection."). An actual determination of compulsion precludes *any* use of the compelled statement in the criminal case. See p. 19, *infra*. *Miranda* instead creates a limited rule of exclusion that is designed to protect the core Fifth Amendment right at trial—the admission of the accused's own compelled statements—and its rationale therefore does not extend to precluding all uses of the unwarned statement.[4]

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[4] Because *Miranda* does not define a substantive rule of conduct for the police, but instead provides a "rule of exclusion," *Chavez* v. *Martinez*, 123 S. Ct. at 2013 (Kennedy, J., concurring in part and dissenting in part), for the court to use in protecting "a fundamental *trial* right," *Withrow* v. *Williams*, 507 U.S. 680, 691 (1993) (citation omitted), *Miranda* does not create a rule that the government must refrain from questioning custodial suspects

C. Because *Miranda* Sweeps More Broadly Than The Core Fifth Amendment Privilege, A Failure To Give Warnings Does Not Preclude All Uses Of Ensuing Statements

Based on its purpose to protect against the risk of admitting a coerced statement at trial, *Miranda* ordinarily prohibits admission of unwarned statements in the government's case in chief. But the Court has determined that *Miranda* does not reach farther to mandate exclusion of *all* testimonial or incriminating use of a voluntary unwarned statement.

1. This Court recognized early on that "[i]t does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes." *Harris* v. *New York*, 401 U.S. 222, 224 (1971). The Court held in *Harris* that unwarned confessions obtained in custodial interrogation were admissible to impeach a defendant's testimony. Accord *Oregon* v. *Hass*, 420 U.S. 714 (1975) (questioning after suspect requested an attorney could be used for impeachment).[5] The absence of warnings, the Court held, did not taint the statement's use for impeachment "provided that 'the trustworthiness of the evidence satisfies legal standards.'" *Id.* at 722 (quoting *Harris*, 401 U.S. at 224); see *Harris*, *id.* at 224 (no claim was made that Harris's statements were "coerced or involuntary"); *Hass*, 420 U.S. at 722-723 (no claim made that Hass's statements were "involuntary or coerced"). In *New York* v. *Quarles*, 467 U.S. 649 (1984), the Court made an exception to *Miranda*'s general bar on the use of unwarned statements in the government's case in chief. *Quarles* held that voluntary unwarned statements made by a defendant during custodial interrogation, but obtained in order to protect the public safety, were admissible in trial against the defendant.

Neither the impeachment rule nor the public safety rule can be reconciled with the position that *Miranda* means that unwarned statements made in custodial interrogation are inherently "compelled" under the Fifth Amendment. In *New Jersey* v. *Portash*, 440 U.S. 450 (1979), the Court held that when testimony is compelled under a grant of immunity, it cannot be used to impeach the defendant's trial testimony. "[A] defendant's compelled statements," the Court explained, "as opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use whatever against him in a criminal trial." *Id.* at 459; see also *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) (impeachment with involuntary statements barred). Thus, statements that are the product of government compulsion are inadmissible for all purposes in a criminal trial. But, as *Harris* and *Quarles* establish, voluntary statements taken without compliance with the *Miranda* procedures during custodial interrogation *are* in some circumstances admissible against the defendant. Accordingly, *Harris* and *Quarles* establish that statements taken without *Miranda* warnings are not necessarily compelled.

2. This Court's decisions in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), and *Oregon* v. *Elstad*, 470 U.S. 298 (1985), reflect the principle that *Miranda* establishes a

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without giving warnings. Police officers do not violate a constitutional prohibition if they conduct non-coercive custodial interrogation without administering *Miranda* warnings. All that ensues is that the statements that result generally cannot be used against the defendant in the government's case in chief.

[5] In both *Harris* and *Hass*, the trial judge instructed the jury that the unwarned statement could be considered as proof only of the defendant's credibility as a witness, not as proof of the defendant's guilt. *Harris*, 401 U.S. at 223; *Hass*, 420 U.S. at 717.

rule of limited admissibility of unwarned statements in the government's case in chief—not a rule that unwarned statements amount to a constitutional violation that necessarily entails the suppression of "fruits." In both *Tucker* and *Elstad*, the Court declined to apply the fruit-of-the-poisonous-tree doctrine to suppress testimonial evidence uncovered following an unwarned statement. In *Tucker*, the Court held that the testimony of a witness who was discovered as a result of a statement obtained from a defendant who had not been given complete *Miranda* warnings did not have to be suppressed as the fruit of the unwarned statement. 417 U.S. at 446-452. In *Elstad*, the Court held that the defendant's own *Miranda*-warned statement obtained after the defendant had previously given a statement without *Miranda* warnings did not have to be suppressed as the fruit of the initial unwarned statement.[6] 470 U.S. at 304-305, 317-318.

Tucker and *Elstad* are premised on the recognition that *Miranda* did not create an absolute rule that unwarned statements are necessarily compelled and that custodial interrogation must therefore be preceded by the warnings if any use of the statement is to be made. See *Tucker*, 417 U.S. at 443-445 (unwarned statements at issue were neither compelled nor "involuntary as that term has been defined in the decisions of this Court"). Indeed, in *Elstad*, the Court explained

[6] The defendant in *Elstad* also argued that, in determining the voluntariness of the second (warned) statement, courts should use the same analysis conducted when the prior statement is "actually coerced" *(i.e.*, an evaluation of the time between interrogations, and their location and circumstances), in order to see "whether that [initial] coercion has carried over into the second confession." 470 U.S. at 309-310. The Court rejected that contention as well. *Id.* at 310-314.

that "[t]he failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced." *Elstad*, 470 U.S. at 310. The "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion" that is "irrebuttable for purposes of the prosecution's case in chief." *Id.* at 307. But "[w]here an unwarned statement is preserved for use in situations that fall outside the sweep of the *Miranda* presumption, the primary criterion of admissibility remains the 'old' due process voluntariness test." *Id.* at 307-308 (internal quotation marks and brackets omitted). The Court in *Elstad* thus cautioned against "appl[ying] our precedents relating to confessions obtained under coercive circumstances to situations involving wholly voluntary admissions."[7] *Id.* at 317-318.

Elstad thus makes clear that the limit of the constitutional rule of *Miranda* is that, outside the public safety context considered in *Quarles*, there is a conclusive presumption in the government's case in chief that an unwarned statement is compelled. But proof of a lack of warnings does not otherwise suffice to invalidate use of unwarned statements. Rather, "the dictates of *Miranda* and the goals of the Fifth

[7] The *Elstad* Court's view of *Miranda* as creating an irrebutable presumption of coercion only in the government's case in chief explained why it rejected application in the *Miranda* context of the Fourth Amendment doctrine of *Wong Sun* v. *United States*, 371 U.S. 471 (1963), that the "fruits" of a constitutional violation must be suppressed. As the *Elstad* Court stated, a court may not "assume[] the existence of a constitutional violation" as the predicate for applying that doctrine. 470 U.S. at 305. See also pp. 29-32, *infra* (explaining the inapplicability of *Wong Sun* in the *Miranda* context), and pp. 38-39 (explaining why *Elstad*'s analysis is consistent with *Dickerson*'s holding that *Miranda* is a constitutional rule).

Amendment proscription against use of compelled testimony are fully satisfied * * * by barring use of the unwarned statements in the case in chief." 470 U.S. at 318.

II. THE *MIRANDA* RULE DOES NOT REQUIRE THE EXCLUSION OF PHYSICAL EVIDENCE DERIVED FROM UNWARNED STATEMENTS

The Court's analysis of *Miranda* explains why it is an exclusionary rule limited to a bar on unwarned statements in the prosecution's case in chief. *Miranda* is a prophylactic rule designed to reduce the risk that an involuntary statement will be admitted against the defendant. The rule casts a wider net than case-specific totality-of-the-circumstances analysis, see *Elstad*, 470 U.S. at 304, because if such case-by-case analysis were the sole source of protection, there would be an unacceptable risk to core Fifth Amendment rights. The *Miranda* rule is limited to excluding unwarned statements from the prosecution's case because the core of the Fifth Amendment prohibits the admission of the defendant's own coerced statements to prove his guilt and because a broader prophylactic suppression rule would impose excessive costs on the truthseeking function of the criminal trial.

By excluding the unwarned statement from the prosecution's case in chief, the core of the Fifth Amendment privilege is protected. The core prohibition corresponds to the sort of inquisitorial practices that brought about the Fifth Amendment: the use of official power to "*extract from the person's own lips* an admission of guilt, *which would thus take the place of other evidence.*" 8 *Wigmore On Evidence* § 2263, at 378 (McNaughton rev. 1961) (emphasis added). *Miranda* provides the defendant with safeguards against the risk

that the Constitution will be violated by the use of his compelled statement, in place of other evidence. Other uses of a defendant's voluntary, but unwarned statement, however, not involving its introduction into evidence, pose a less direct threat to the Fifth Amendment privilege. At the same time, the costs of excluding otherwise voluntary, reliable evidence are high. For that reason, "[t]he exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy." *Chavez*, 123 S. Ct. at 2013 (Kennedy, J., concurring in part and dissenting in part). There is no sufficient justification for excluding physical evidence that the police discover as a result of an unwarned statement.

A. The Costs Of Extending The *Miranda* Rule Outside The Core Fifth Amendment Privilege Are High

The application of *Miranda* to exclude evidence always has costs. The rule "sweeps more broadly than" the basic protection of the Self-Incrimination Clause, because the rule excludes some confessions even in the absence of the actual compulsion that is the target of the Clause. *Elstad*, 470 U.S. at 306. Statements given in custodial interrogation without *Miranda* warnings may be both entirely voluntary and exceptionally reliable. Thus, "[t]he disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result." *Dickerson*, 530 U.S. at 444; see *Withrow* v. *Williams*, 507 U.S. 680, 690 (1993) ("The [*Miranda*] Court indeed acknowledged that, in barring introduction of a statement obtained without the required warnings, *Miranda* might exclude a confession that we would not condemn as 'involuntary in traditional terms,'

* * * and for this reason we have sometimes called the *Miranda* safeguards 'prophylactic' in nature.") (citation omitted). Nonetheless, this Court has determined that, in order to protect Fifth Amendment rights, the cost of excluding some reliable and otherwise admissible evidence is outweighed by the interest in protecting against admission of a compelled confession against a defendant.

In other contexts in the trial, however, this Court's decisions in *Harris*, *Tucker*, and *Elstad* reveal that the costs of exclusion are too great. In *Harris*, for example, the Court explained that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." 401 U.S. at 226. In so holding, the Court emphasized the importance of impeachment as one of the "truth-testing devices of the adversary process." *Id.* at 225. And in *Tucker*, the Court stressed "the strong interest of any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." 417 U.S. at 450.

That interest is strongly implicated when suppression of reliable physical evidence is at issue. Here, for example, the government seeks to introduce at trial the gun whose location respondent provided to police. His unwarned statement would never be used in trial; therefore, he would not face the risk of infringement of his Fifth Amendment right not to have any compelled statements that he might have made admitted in evidence against him. To exclude the gun as well would impose an insuperable barrier to the government's ability to prosecute respondent at all. An effective grant of immunity from prosecution is an excessive cost for society to bear because the police failed to provide

complete warnings to a suspect before asking him questions.

B. There Are No Policy Justifications Sufficient To Justify Exclusion Of Physical Evidence Derived From An Unwarned Statement

In certain Fifth Amendment contexts, a rule excluding derivative evidence has been adopted by this Court. For example, in examining immunity statutes under the Fifth Amendment, this Court has held that the Fifth Amendment privilege of a defendant not to be compelled to be a witness against himself protects against incrimination from evidence that is derived from compelled testimony. *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972); see also *Counselman* v. *Hitchcock*, 142 U.S. 547, 585 (1892). As a textual matter, "the Fifth Amendment might have been read to limit its coverage to compelled testimony that is used against the defendant in the trial itself." *United States* v. *Hubbell*, 530 U.S. 27, 37 (2000). But "it has * * * long been settled that [the privilege's] protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence." *Ibid.* The Court has thus determined that, to be coextensive with the protection of the Fifth Amendment, a grant of immunity must preclude not only the use, but also the derivative use of the witness's testimony in a criminal case. *Kastigar*, v. *United States*, *supra* (upholding the constitutionality of 18 U.S.C. 6002, which protects against the use of information "directly or indirectly derived from [compelled] testimony").

This Court has never explicitly held that physical evidence that was derived from compelled or involun-

tary statements made in police interrogation must be excluded from the prosecution's case, nor has it imported into the context of informal compulsion by the police the heavy burden imposed on the prosecution to show that it has not made indirect use of testimony compelled under a grant of immunity. Cf. *Kastigar*, 406 U.S. at 460 (prosecution must carry the burden to establish that its evidence "is derived from a legitimate source wholly independent of the compelled testimony"). But assuming, as the government does not dispute, that some form of a derivative-evidence exclusionary rule would be justified when the police actually overcome the defendant's will through coercive or abusive tactics and produce a compelled statement, cf. *New York* v. *Quarles*, 467 U.S. 649, 672 (1984) (O'Connor, J., concurring in part and dissenting in part), the justifications for such a rule are absent when the record does not establish actual compulsion.

First, the Fifth Amendment is not inherently concerned with physical evidence, and judicially crafted extensions of the Fifth Amendment should be developed with greater restraint when the effect is to exclude evidence that does not have a testimonial component. Second, deterrence concerns are inapt in this context, because the Constitution does not forbid interrogation without prior administration of *Miranda* warnings and, even assuming that deterrence of unwarned questioning were an appropriate purpose of *Miranda*, the rule provides sufficient deterrence by suppressing the unwarned statement itself from use in the government's case. Third, the concerns about unreliable confessions resulting from actual coercion do not carry significant force when the confession itself is not admitted in court and coercion has not been shown;

any unreliability in the confession does not carry over to the physical evidence.

1. *The Fifth Amendment Is Not Inherently Concerned With Physical Evidence*

In assessing whether courts should suppress physical evidence derived from a failure to give *Miranda* warnings, it is appropriate to recall that the Fifth Amendment itself is not directly concerned with compulsory provision of physical evidence. The Self-Incrimination Clause is concerned directly with *testimony*; it does not protect individuals from being required to provide nontestimonial evidentiary materials, even if they may be incriminating. *United States* v. *Hubbell*, 530 U.S. 27, 34-35 (2000). That principle was articulated in *Schmerber* v. *California*, 384 U.S. 757 (1966), which was handed down only a week after *Miranda*. In *Schmerber*, the Court held that the withdrawal of blood from a defendant and the admission of its analysis at his trial did not violate the Self-Incrimination Clause of the Fifth Amendment. The Court held that "the privilege [against self-incrimination] protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature," and "the withdrawal of blood and use of the analysis in question * * * did not involve compulsion to those ends." *Id.* at 761. The Court explained that "[s]ince the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds." *Id.* at 765.

Schmerber thus makes clear that the Self-Incrimination Clause of the Fifth Amendment does not bar the admission of nontestimonial evidence compelled

from a suspect. An individual may be required, consistently with the Self-Incrimination Clause, to provide a blood sample, as in *Schmerber*, a voice exemplar, see *United States* v. *Dionisio*, 410 U.S. 1, 5-7 (1973), or a handwriting sample, see *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967), and an individual may be required as well to participate in a lineup, see *United States* v. *Wade*, 388 U.S. 218, 222-223 (1967), or to try on a blouse in court, see *Holt* v. *United States*, 218 U.S. 245, 252-253 (1910).

This case raises a distinct issue from the *Schmerber* line of cases because here, when a suspect answers police questions about the location of evidence without *Miranda* warnings, he has unquestionably made testimonial communications that lead the officers to incriminating facts. But if *Schmerber* lies at one polar Fifth Amendment extreme (the permitted use of compulsion to obtain nontestimonial evidence) and a coerced confession lies at the other (the prohibited use of compulsion to obtain testimonial evidence), then this case falls in the middle. As Judge Friendly observed more than three decades ago, the use of a suspect's uncoerced, but unwarned, statements, to locate physical incriminating evidence "differs only by a shade from the permitted use for that purpose of his body or his blood." Henry J. Friendly, *Benchmarks* 280 (1967). He continued:

> Since the case lies between what the state clearly may compel and what it clearly may not, a strong analytical argument can be made for an intermediate rule whereby although it cannot require the suspect to speak by punishment or force, the non-testimonial fruits of speech that is excludable only for failure to comply with the *Miranda* code could still be used.

Ibid. That "intermediate" rule appropriately reconciles Fifth Amendment values by excluding the unwarned statement, but—when the statement is otherwise not compelled—allowing admission of its tangible and nontestimonial "fruits."

2. A Deterrence Rationale Does Not Support Extending Miranda To Exclude Derivative Evidence

In several of this Court's opinions, the Court has considered whether the need to deter improper conduct justified the extension of *Miranda*'s rule barring unwarned statements from the government's case in chief. See *Elstad*, 470 U.S. at 308; *Tucker*, 417 U.S. at 447; *Hass*, 420 U.S. at 723; *Harris*, 401 U.S. at 225; see also *Nix* v. *Williams*, 467 U.S. 431, 442-443 (1984). Although in each of those cases, the Court rejected the extension of the *Miranda* exclusionary rule on the basis of a deterrence rationale, the court of appeals in this case placed its primary reliance on a deterrence rationale to embrace an expansive fruits rule that reaches physical evidence derived from unwarned statements. Pet. App. 26a-33a. Deterrence offers no justification for suppression of the physical evidence obtained in this case.

a. *Deterrence policies are inapplicable to* Miranda. In *Wong Sun* v. *United States*, 371 U.S. 471, 485 (1963), the Court determined that evidence that is the fruit of an illegal search or seizure under the Fourth Amendment must be suppressed. In *Elstad*, the Court declined to apply the Fourth Amendment "fruits" doctrine to exclude evidence that could be viewed as the "fruit" of a *Miranda* violation. See 470 U.S. at 305-309. The Court emphasized that there is a crucial distinction

between an actual coerced confession and a statement in which "the breach of the *Miranda* procedures * * * involved no actual compulsion." *Id.* at 308. In the latter case, the underlying Fifth Amendment rule prohibiting introduction of "compelled" testimony is not violated. *Id.* at 306-307 & n.1.

The court of appeals believed that *Elstad* "drew a distinction between fruits consisting of a subsequent confession by the defendant after having been fully *Mirandized*," which need not be suppressed, and "fruits consisting of subsequently obtained 'inanimate evidentiary objects,'" which the court of appeals concluded must be suppressed. Pet. App. 16a (quoting *Elstad*, 470 U.S. at 309). *Elstad* did involve a subsequent statement by the defendant, not physical evidence, and the Court thus focused on the defendant's request for derivative suppression of his voluntary, warned statement after he had made an unwarned (but also voluntary) statement. But *Elstad*'s rationale is not limited to that specific type of a "fruits" claim. In addition to noting that the second statement in that case was the product of the suspect's "own volition," 470 U.S. at 308; *Elstad* more broadly rejected the proposition that the *Wong Sun* doctrine applies to the fruits of a statement obtained without *Miranda* warnings. After discussing *Tucker* and that decision's refusal to apply suppression, the *Elstad* Court stated that *Tucker*'s reasoning applies "with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation" was "a witness" "*an article of evidence*," or "the accused's own voluntary testimony." 470 U.S. at 308 (emphasis added). *Elstad* made clear that suppression was unwarranted in all three contexts. It is therefore unsurprising that this Court in *Dickerson* read *Elstad* as broadly "refusing to apply the traditional 'fruits' doctrine developed in Fourth

Amendment cases" in view of the *Elstad*'s Court's recognition that "unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." 530 U.S. at 441.

An unreasonable search violates the Fourth Amendment when the search occurs, and "use of fruits of a past unlawful search or seizure work[s] no new Fourth Amendment wrong." *United States* v. *Leon*, 468 U.S. 897, 906 (1984) (internal quotation marks omitted). The Fourth Amendment's exclusionary rule, including the *Wong Sun* "fruits" doctrine, is designed to deter such violations, even at the cost of losing reliable evidence at trial. See *United States* v. *Calandra*, 414 U.S. 338, 348 (1974) (Fourth Amendment exclusionary rule is "designed to safeguard Fourth Amendment rights generally through its deterrent effect" and is not "a personal constitutional right of the party aggrieved"); accord *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *United States* v. *Janis*, 428 U.S. 433, 446 (1976).

But this Court has recognized the different purposes of the Fourth Amendment exclusionary rule and *Miranda*. *Withrow* v. *Williams*, 507 U.S. 680, 691 (1993) (noting that "*Miranda* differs from *Mapp* in both respects" that define the Fourth Amendment exclusionary rule). Police officers do not violate the Fifth Amendment as implemented by *Miranda* when they take an unwarned statement during custodial interrogation.[8] *Miranda*'s implementation of the Fifth

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[8] Indeed, as the plurality in *Chavez* v. *Martinez*, 123 S. Ct. at 2001, indicated, "it is not until the[] use [of statements compelled by police interrogation] in a criminal case that a violation of the Self-Incrimination Clause occurs" (citation omitted). It follows from that principle that no violation of the Self-Incrimination Clause occurs merely when the police conduct unwarned questioning (and, therefore, that *Wong Sun*'s principles do not

Amendment requires only that the defendant be accorded the right at trial to exclude the unwarned statement from the government's case. See *Chavez*, 123 S. Ct. at 2013 (Kennedy, J., concurring in part and dissenting in part) ("*Miranda* mandates a rule of exclusion. * * * The exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy.").

Miranda itself does contain language that purports to establish rules for the conduct of the police. *E.g.*, 384 U.S. at 473-474. Some of this Court's later cases contain similar descriptions of the *Miranda* procedures, see, *e.g.*, *Moran* v. *Burbine*, 475 U.S. 412, 420 (1986) ("*Miranda* imposed on the police an obligation to follow certain procedures in their dealings with the accused."), and speak of assessing whether particular applications of the *Miranda* exclusionary rule would deter departures from those procedures, see, *e.g.*, *Michigan* v. *Tucker*, 417 U.S. at 448. But this Court's understanding of *Miranda* has evolved, and the rule's purpose, as properly understood, is to guard against the risk that *the courts* will erroneously admit a coerced confession; it is not to regulate out-of-court conduct by *the police*. See *Dickerson*, 530 U.S. at 442, 443-444; see also *Chavez*, *supra*. Accordingly, the taking of unwarned statements need not be deterred.

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directly apply in the Fifth Amendment context). But that principle does not resolve whether, if police questioning produced an actually compelled statement, the courts could exclude evidence derived from the statement. The government does not dispute that they could. In the present context, the basis for not extending *Miranda* to suppress derivative physical evidence is that (1) such a rule would extend *Miranda* beyond its prophylactic purposes, and (2) the costs of suppression are too high and unjustified, for the reasons described in the text.

b. *If deterrence were a purpose of* Miranda, *exclusion of the unwarned statements from the government's case in chief would be sufficient.* The government's primary argument is that deterrence is not a purpose of the *Miranda* exclusionary rule, and that the police do not engage in misconduct by questioning without providing the warnings.[9] But even if deterrence of the failure of police to give *Miranda* warnings were the basis of the *Miranda* exclusionary rule, the rule should not be extended to exclude derivative evidence. Suppression of the unwarned statement itself in the government's case in chief is a sufficient deterrent. *Harris*, 401 U.S. at 225 ("Assuming that the [*Miranda*] exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief."); cf. *New York* v. *Quarles*, 467 U.S. 649, 669 (1984) (O'Connor, J., concurring in part and dissenting in part.) ("The harm caused by failure to administer *Miranda* warnings relates only to admission of testimonial self-incriminations, and the suppression of such incriminations should by itself produce the optimal enforcement of the *Miranda* rule.").

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[9] There are many settings in which the police might appropriately desire to interrogate without warnings, if they conclude that the giving of the warnings might jeopardize their ability to obtain answers. This is true not only under the public safety exception to *Miranda* adopted in *Quarles*, but in other situations that may fall outside of *Quarles*. "The most obvious example, first suggested by Judge Henry Friendly, involves interrogation directed to the discovery and termination of an ongoing criminal activity such as kidnapping or extortion." *Quarles*, 467 U.S. at 668 n.3 (O'Connor, J., concurring in part and dissenting in part.).

This case illustrates why any greater deterrence would be inappropriate. The officer in this case began to give respondent the *Miranda* warnings, only to be interrupted (after advising respondent of the right to remain silent) by respondent's assertion that he knew his rights. It is difficult to characterize the officer's decision not to insist on completing the warnings as such culpable conduct as to warrant suppressing not only the unwarned statements themselves, but also the gun that was found as a result.[10] The same will be true in many instances in which a fast moving investigation, or confusion about whether a defendant has already received *Miranda* warnings, results in a failure to issue them. Where, as in such cases, the failure to administer *Miranda* warnings was not a purposeful interrogation tactic to obtain incriminating evidence, a deterrence rationale is particularly weak.

The court of appeals believed that "the inability to offer [respondent's] statements in this case affords no deterrence, because the ability to offer the physical evidence (the gun) renders the statements superfluous to conviction." Pet. App. 27a. The court, however, was mistaken. Physical evidence derived from unwarned statements must still be independently linked to an accused to have any probative force at trial. Because that link may be difficult to make without the defendant's statement, the suppression of an unwarned statement could preclude prosecution in many cases despite the admissibility of the derivative physical

[10] Notably, respondent consented to allow the officer to enter his house to retrieve the gun. A valid consent to search under the Fourth Amendment does not require any notification of the person's right to refuse; it need only be voluntary. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

evidence. For example, suppression of an accused's unwarned statement acknowledging his ownership or the location of a firearm or drugs often precludes prosecution in the not uncommon situation where the firearm or drugs are found in a location (such as a residence or a car) to which others also have ready access. Similarly, the suppression of an accused's unwarned confession to a murder that led to the location of the victim's body could easily preclude a prosecution for murder despite the admissibility of the victim's body. The police have significant incentives to preserve the ability to admit a defendant's statement in court and, therefore, to issue *Miranda* warnings. The court of appeals significantly underestimated the deterrent effect of suppressing an accused's unwarned statement.

3. *The Exclusion Of Physical Evidence Does Not Serve The Fifth Amendment's Concern With The Reliability Of Evidence*

Excluding physical evidence that results from unwarned statements would also have no purpose connected to the Fifth Amendment's concern with reliability. The privilege against compelled self-incrimination is based in part on the recognition that "coerced confessions are inherently untrustworthy." *Dickerson*, 530 U.S. at 433. Although coerced confessions are excluded whether or not they are determined to be true, see *Rogers* v. *Richmond*, 365 U.S. 534, 540-541 (1961), "it also seems clear that coerced statements have been regarded with some mistrust" and there is a concern that "severe pressures" caused by particular interrogation practices "may override a particular suspect's insistence on innocence" and lead him "to accuse himself falsely." *Tucker*, 417 U.S. at 444-449 & n.23. By excluding an entire class of statements in which "the

coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements," *Dickerson*, 530 U.S. at 435, the *Miranda* rule thus "guard[s] against 'the use of unreliable statements at trial.'" *Withrow* v. *Williams*, 507 U.S. 680, 692 (1993) (quoting *Johnson* v. *New Jersey* 384 U.S. 719, at 730 (1966)); see also *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 240 (1973) ("The [*Miranda*] Court made it clear that the basis for the decision was the need to protect the fairness of the trial itself.").

Where physical evidence is at issue, however, that reliability concern has no force. As a general rule, physical evidence, such as the gun seized in this case, undoubtedly constitutes "reliable," *Stone*, 428 U.S. at 490, and "trustworthy" evidence, *Leon*, 468 U.S. at 907. See *Tucker*, 417 U.S. at 458 (Brennan, J., concurring) ("[T]he element of unreliability * * * is of less importance when the admissibility of 'fruits' is at issue. There is no reason to believe that the coercive atmosphere of the station house will have any effect whatsoever on the trustworthiness of 'fruits.'"). As Judge Friendly explained:

> There is thus good reason to impose a higher standard on the police before allowing them to use a confession of murder than a weapon bearing the confessor's fingerprints to which his confession has led; doubtless this is the reason why fruits of a confession "not blatantly coerced" are admitted in England, India, and Ceylon, countries on whose experience the *Miranda* opinion relied.

Benchmarks 282; see also *Quarles*, 467 U.S. at 673 (O'Connor, J., concurring in part and dissenting in part.).[11] Consequently, admitting such physical evidence at trial does not implicate the Fifth Amendment's concern to protect the truth-seeking process, while suppression of that physical evidence would plainly undermine the search for the truth.

III. *DICKERSON* DOES NOT ALTER THE SCOPE OF THE *MIRANDA* RULE

In *Dickerson* v. *United States*, 530 U.S. 428 (2000), the Court held that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively," and, "[f]ollowing the rule of *stare decisis*, [the Court] decline[d] to overrule *Miranda* [itself]." 530 U.S. at 444. Nothing in the Court's recognition that *Miranda* "is constitutionally based," *id.* at 440, however, requires any broadening of the scope of the *Miranda* rule. To the contrary, the Court's decision in *Dickerson* itself rested on principles of stare decisis. Far from suggesting an alteration in the scope of the *Miranda* exclusionary rule to encompass evidence derived from unwarned statements, *Dickerson* is inconsistent with any such alteration.[12]

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[11] The English rule is now embodied in a statute. See Police and Criminal Evidence Act, 1984, § 76(4) ("The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence * * * of any facts discovered as a result of the confession."); see P.J. Richardson et al., *Archbold—Criminal Pleading, Evidence and Practice*, § 15-274, at 1447 (2003) ("Under the law prior to the [above] Act * * *, evidence of facts discovered as a result of an inadmissible confession could be given but without calling in aid any part of the confession from which they may have been derived: *R.* v. *Warwickshall* (1783) 1 Leach 298; *R.* v. *Berriman*, (1854) 6 Cox 388. * * * Section 76(4) retains the law as established in *Warwickshall* and *Berriman*.").

[12] Before this Court decided *Dickerson*, the majority of the courts of appeals, including the court below, refused to suppress

1. The court of appeals believed that "*Dickerson* undermined the logic underlying *Tucker* and *Elstad*." Pet. App. 13a. In reaching its conclusion that the *Miranda* rule was a "constitutional decision," 530 U.S. at 432, however, the Court in *Dickerson* referred specifically and approvingly to *Elstad*'s rejection of the *Wong Sun* fruits doctrine:

> Our decision in [*Elstad*]—refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases—does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.

Id. at 441 (emphasis added). *Dickerson*, therefore, did not alter the settled rule announced in *Elstad* that limited the scope of the Miranda exclusionary rule. Indeed, the doctrine of stare decisis was integral to the holding in *Dickerson*. *Id.* at 444 ("Following the rule of

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physical evidence derived from an unwarned statement. See *United States* v. *Morales*, 788 F.2d 883, 886-887 (2d Cir. 1986); *United States* v. *Elie*, 111 F.3d 1135, 1141 (4th Cir. 1997); *United States* v. *Bengivenga*, 845 F.2d 593, 600-601 (5th Cir.) (en banc), cert. denied, 488 U.S. 924 (1988); *United States* v. *Sangineto-Miranda*, 859 F.2d 1501, 1514-1519 (6th Cir. 1988); *United States* v. *Cannon*, 529 F.2d 890, 894-895 (7th Cir. 1976); *United States* v. *Gonzalez-Sandoval*, 894 F.2d 1043, 1048 (9th Cir. 1990); *United States* v. *McCurdy*, 40 F.3d 1111, 1117 (10th Cir. 1994). The only post-*Dickerson* court of appeals to change its position after *Dickerson* was the Tenth Circuit in this case. See Pet. 10-12 (citing cases). The First Circuit has adhered to its position declining to announce a flat rule against suppression of the fruits of an unwarned statement, but holding that suppression of physical fruits is not warranted for a negligent failure to give *Miranda* warnings. *United States* v. *Faulkingham*, 295 F.3d 85 (1st Cir. 2002), petition for cert. pending, No. 02-7385 (filed Oct. 7, 2002).

stare decisis, we decline to overrule *Miranda*."). And in its stare decisis analysis, the Court in *Dickerson* also placed critical reliance on the continuing validity of its post-*Miranda* cases (which include *Tucker* and *Elstad*) explaining that those cases had "reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief." *Id.* at 443-444.

Dickerson thus preserved the distinction in this Court's cases between the rules limiting the admissibility of unwarned statements in the government's case in chief and the rules permitting the admissibility of fruits of an unwarned voluntary statement. Aside from cases involving an exception, see *New York* v. *Quarles*, 467 U.S. 649 (1984), unwarned statements are inadmissible as evidence in the government's case in chief. Under the principles of *Tucker* and *Elstad*, however, evidence derived from those statements is admissible, so long as the unwarned statements were voluntary under the traditional totality-of-the-circumstances test.

2. The court of appeals believed the reasoning of *Elstad* and *Tucker* was called into doubt because those cases had reasoned that departures from *Miranda*'s warning requirements breached only a non-constitutional rule, while *Dickerson* "declared that *Miranda* articulated a constitutional rule rather than merely a prophylactic one." Pet. App. 12a. There is language in *Elstad* and *Tucker* that refers to a breach of *Miranda* procedures as distinct from a violation of the Constitution.[13] But that language is best understood as

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[13] *Tucker* stated that questioning without warnings "did not abridge [the defendant's] constitutional privilege * * * but departed only from the prophylactic standards later laid down by this

drawing a distinction between actual coercion and the presumption of coercion that *Miranda* adopts for a specific and limited purpose. The dichotomy that the court of appeals drew between *Miranda* as a "constitutional" rule and *Miranda* as a "prophylactic" rule in fact does not exist. *Miranda* is a prophylactic constitutional rule designed to provide additional protection for the core right defined in the Self-Incrimination Clause that "[n]o person shall * * * be compelled in any criminal case to be a witness against himself." It is prophylactic, in that it excludes some statements that, in a perfect world, might not be deemed compelled. But it is constitutional, in that it seeks to protect against the possibility of admitting, because of the uncertainties of the judicial process, an actually compelled statement.

Dickerson therefore provides no reason for concluding that a failure to give *Miranda* warnings necessitates a broad application of the fruit-of-the-poisonous-tree doctrine. The *Miranda* rule serves its purpose of protecting the core right of a defendant not be a witness against himself at his criminal trial by excluding unwarned statements from the prosecution's case in chief. Extension of its automatic rule of exclusion to evidence derived from unwarned statements is not required by the Constitution and would impose serious costs on the truthseeking function of a criminal trial.

Court in *Miranda* to safeguard that privilege." 417 U.S. at 446. *Elstad* stated (in describing *Tucker*) that "[s]ince there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed." 470 U.S. at 308.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

SAMUEL FRANCIS PATANE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does the derivative evidence rule, or "fruit of the poisonous tree" doctrine, apply to physical evidence located as the direct result of statements obtained from the defendant in violation of the constitutional rule announced in *Miranda v. Arizona*, 384 U.S. 436 (1966)?

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STATEMENT OF FACTS

A. Evidence adduced at the suppression hearing

On June 3, 2001, respondent Samuel Patane was released on bond from the El Paso County jail in Colorado Springs, Colorado.[1] J.A. 25. Fifty-year-old Mr. Patane had been jailed on domestic violence charges pressed by his 43-year-old ex-girlfriend, Linda O'Donnell. J.A. 11, 88-89. As required by Colorado law, a mandatory three-day restraining order was entered against Mr. Patane when he was released from jail. J.A. 11. The restraining order prohibited him from making any contact, direct or indirect, with Ms. O'Donnell. J.A. 12.

At the time of his release, Mr. Patane had a prior felony conviction for possession of a controlled substance, as well as a prior misdemeanor domestic violence conviction. J.A. 5, 91-93. Both convictions prohibited him from possessing a firearm. *See* 18 U.S.C. §922(g) (2003).

On the day the restraining order was to expire, Ms. O'Donnell called the police to report a violation of the restraining order that had allegedly occurred two days earlier. J.A. 11, 19. She reported that she had received a telephone call two days before, but when she picked up the phone, the caller hung up. J.A. 12. She reported that she then activated the "*69" feature on her telephone, a feature that identifies the telephone number from which the last call was placed. J.A. 26. According to Ms. O'Donnell, the "*69" feature indicated that the call had

[1] Respondent pronounces his name "Pat-nee."

been placed from Mr. Patane's telephone number. J.A. 12. Ms. O'Donnell also told the police that Mr. Patane had a gun, a "Glock" that he had purchased at a gun show. J.A. 13, 37-38.

Earlier, someone – perhaps Ms. O'Donnell – had told Mr. Patane's probation officer that Mr. Patane had a gun. J.A. 36-37, 44-45, 91. The probation officer had reported this to the Bureau of Alcohol, Tobacco and Firearms (ATF), and ATF had enlisted a local police detective to investigate. J.A. 35-36. The detective, Josh Benner, was a member of a joint ATF/Colorado Springs Police Department gun-interdiction task force. J.A. 35.

After Ms. O'Donnell reported the hang-up phone call, a local police officer, Tracy Fox, prepared a complaint that authorized Mr. Patane's arrest for a restraining-order violation. J.A. 11-12, 92. She and another officer, Officer Mulso, then went to Mr. Patane's home to arrest him. J.A. 14. They were met there by Detective Benner, who planned to question Mr. Patane about the gun. J.A. 39. Officers Fox and Mulso were in uniform. J.A. 14-15. Detective Benner was in plain clothes but was wearing a badge and carrying a sidearm. J.A. 39-40, 42. The two uniformed officers went to the front door, while Detective Benner went around back, in case Mr. Patane tried to run. J.A. 14. The two uniformed officers knocked and asked for Mr. Patane. J.A. 14.

Mr. Patane came to the door, barefoot, and the officers asked him to step outside. J.A. 15, 21. They told him that they wanted to talk to him about a report that he had violated a restraining order involving Linda O'Donnell. J.A. 15, 30. Mr. Patane complied with their request to step outside but said that he had not violated the restraining

order. J.A. 15, 30. When Officer Fox asked Mr. Patane to explain Ms. O'Donnell's allegation that he had called her and hung up, Mr. Patane said that he had not made any such call and that Ms. O'Donnell was falsely accusing him. J.A. 15, 30, 90.

Officer Fox then placed Mr. Patane under arrest for a restraining-order violation, but she did not read him his *Miranda* rights. J.A. 15, 30. Instead, she asked him if he had any identification and if he wanted to get his shoes. J.A. 15. Mr. Patane went back into the house, and the officers followed him. J.A. 16. When Mr. Patane reached his bedroom, he became very upset. J.A. 16. According to Officer Fox, he started "crying and yelling and saying things weren't fair and that [the officers] were ruining his life." J.A. 16. Because, as Officer Fox characterized it, Mr. Patane "started basically to freak out," the officers placed him in handcuffs. J.A. 16. Officer Fox then retrieved Mr. Patane's identification for him, but not his shoes, and the officers led the handcuffed Mr. Patane back outside. J.A. 16.

Detective Benner had by then come back around to the front of the house, and he approached Mr. Patane. J.A. 16. He told him that he was with the ATF gun-interdiction unit and that he was there to talk to him. J.A. 40. Detective Benner started to read Mr. Patane his *Miranda* rights but got no further than, "You have the right to remain silent," when the handcuffed, barefoot, and still upset Mr. Patane said, "I know my rights." J.A. 31, 40, 47. Detective Benner responded, "You know your rights?" J.A. 31, 40. Mr. Patane answered either, "Yes," or "Yeah, I know my rights." J.A. 40, 46. Detective Benner did not then, or at any point, obtain from Mr. Patane a waiver of his rights. Instead, being aware that Mr. Patane was still upset about

the restraining-order allegation, the detective began to question him about the gun. J.A. 40-41, 47.

Detective Benner said that he was interested in the guns that Mr. Patane owned. J.A. 41. Mr. Patane responded by referring to a gun other than the one in which Detective Benner was interested. J.A. 41. Detective Benner replied that he was more interested in the "Glock." J.A. 41. Mr. Patane said, "I am not sure I should tell you anything about the Glock because I don't want you to take it away from me." J.A. 41. Detective Benner persisted despite Mr. Patane's stated reluctance to say anything further. Detective Benner said, "In order to be truthful about this whole matter – you have been truthful up to this point – I need to know about the Glock." J.A. 41. Detective Benner also said that Mr. Patane had been cooperative up to that point and that "to get in front of the domestic violence case, he needed to be truthful regarding the location of his firearm." J.A. 48. At that point, Mr. Patane disclosed the location of the gun, telling Detective Benner: "The Glock .40 caliber pistol is in my bedroom on the wooden shelf against the wall in a gray case." J.A. 93.

Detective Benner asked Mr. Patane if he could have permission to get the gun. J.A. 41. Mr. Patane either said, "Yes," or "Yes. Again, it's on the wooden shelf in my bedroom." J.A. 41, 93. Detective Benner then went into the house and found the gun, exactly where Mr. Patane said it would be, in a gray gun case on a wooden bookshelf, behind some magazines. J.A. 41-42, 93.

B. Proceedings below

Mr. Patane was indicted in the United States District Court for the District of Colorado for possession of a

firearm after a previous felony conviction, in violation of 18 U.S.C. §922(g). *See United States v. Patane*, 304 F.3d 1013 (10th Cir. 2002). He moved to suppress the firearm on Fourth Amendment grounds, arguing that the seizure of the gun was the fruit of an arrest effected without probable cause. *Id.* He also moved to suppress the gun on Fifth Amendment grounds, arguing that the seizure of the gun was the fruit of an unlawful interrogation that was conducted both in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and by coercive tactics. C.A. doc. 12; J.A. 62-65, 74. Mr. Patane argued that, in addition to having been obtained in violation of *Miranda*, the statements that resulted from this interrogation were actually compelled. C.A. doc. 12; J.A. 64. The government conceded a *Miranda* violation, acknowledging that there "was not a knowing waiver," but argued that the statements were nonetheless voluntary. J.A. 74, 86.

After an evidentiary hearing, the court granted Mr. Patane's motion to suppress the gun. J.A. 78-86. The court rested its holding on Fourth Amendment grounds, ruling that Linda O'Donnell's uncorroborated report of a single, hang-up call from Mr. Patane's phone did not constitute probable cause to believe that Mr. Patane had violated the restraining order. J.A. 78-85. The court also concluded, as the government conceded, that a *Miranda* violation had occurred. J.A. 85-86.

After the district court announced its ruling from the bench, government counsel asked the court if it would make a finding that Mr. Patane's statements were voluntary. J.A. 86. The court, which, in earlier responding to the government's argument that Mr. Patane's statements were

voluntary, had pointed out that Mr. Patane was handcuffed, in custody, and upset when he made the statements, denied the request. J.A. 74, 86.

The government filed an interlocutory appeal, challenging the district court's probable cause ruling. *Patane*, 304 F.3d at 1013. Mr. Patane argued in response that the probable cause ruling should be affirmed and that the suppression order could also be affirmed on the ground that the gun was the inadmissible fruit of a *Miranda* violation. *Id.*

The court of appeals rejected the district court's probable cause ruling but affirmed the suppression order on the ground that the gun was the inadmissible fruit of a *Miranda* violation. *Id.* The court reasoned that, because this Court's decision in *Dickerson v. United States*, 530 U.S. 428 (2000), established that a violation of *Miranda*'s warning requirement is a violation of the Constitution, suppression of the physical fruit of such a violation is required. The court reasoned further that suppression is required regardless of whether the violation of *Miranda* is negligent or intentional because 1) a suspect's rights are violated "just as surely by a negligent failure to administer *Miranda* warnings as a deliberate failure," and 2) "[d]eterrence is necessary not merely to deter intentional wrongdoing, but also to ensure that officers diligently (non-negligently) protect – and properly are trained to protect – the constitutional rights of citizens." *Patane*, 304 F.3d at 1028-29.

After filing a petition for rehearing en banc, which was denied, the government filed a petition for certiorari, asserting that the question presented was "whether a failure to give a suspect the warnings prescribed by

Miranda v. Arizona, 384 U.S. 436 (1966), requires the suppression of physical evidence derived from the suspect's unwarned but *voluntary* statement." Petition for a Writ of Certiorari at (I) (emphasis added). The government asserted this as the question presented notwithstanding the district court's specific denial of the government's request for a finding on the issue of voluntariness.

This Court granted certiorari.

SUMMARY OF ARGUMENT

Miranda v. Arizona, 384 U.S. 436 (1966), announced a constitutional rule with two components. First, before a police officer may interrogate a person who is in custody, he must inform the person of his rights – including his right to have counsel present during the interrogation – and must obtain a waiver of those rights before proceeding further. If the suspect asserts his right to remain silent or to have counsel present during the interrogation, the officer must honor that assertion. Second, if the police officer violates the rule – by failing to inform the person of his rights, by failing to obtain from the person a waiver of his rights, or by failing to honor an assertion of the person's rights – any statements resulting from the interrogation are not admissible to prove the person's guilt at trial.

A violation of the constitutional rule of *Miranda* is a violation of the Constitution. Consequently, the derivative evidence rule, or "fruit of the poisonous tree" doctrine, which applies to constitutional violations, applies to *Miranda* violations.

Even if a violation of the constitutional rule of *Miranda* were not a violation of the Constitution, the derivative evidence rule would apply under the balancing test used to determine the applicability of the derivative evidence rule to non-constitutional violations. In this case, which involves: 1) a clear violation of *Miranda*; 2) directly followed by interrogation as to the location of physical evidence and seizure of the evidence upon the suspect's disclosure of its location; 3) followed by prosecution of the defendant for possession of the physical evidence, the interests served by excluding the physical evidence outweigh the interests served by admitting it.

ARGUMENT

I. Introduction

The exclusionary rule requires the exclusion of unlawfully obtained evidence. The derivative evidence rule is a corollary to the general exclusionary rule and requires the exclusion of evidence derived from the initial, unlawfully obtained evidence. The rule is sometimes referred to as "the fruit of the poisonous tree" doctrine, the "tree" being the primary evidence and the "fruit" being the secondary, derivative evidence. *See, e.g., Nardone v. United States*, 308 U.S. 338, 341 (1939) (referring to unlawfully intercepted telephone conversations as the "poisonous tree" and evidence derived from the conversations as "fruit").

This Court has applied the derivative evidence rule to various types of police misconduct. This Court has applied the derivative evidence rule, for example, to constitutional violations, *e.g., Wong Sun v. United States*, 371 U.S. 471 (1963), to violations of federal statutes, *e.g., Nardone*, 308 U.S. at 338; to violations of federal rules, *e.g., Harrison v. United States*, 392 U.S. 219 (1968), and to violations of court-made prophylactic rules, *id.*

This Court has never decided the question presented here: whether the derivative evidence rule applies to a violation of the warning requirement of *Miranda v. Arizona*, 384 U.S. 436 (1966), that results in the recovery of physical evidence.[2] Nonetheless, the approach that this Court has taken in cases applying the derivative evidence rule compels its application here. Under this approach, when a violation of the Constitution is involved, this Court applies the derivative evidence rule automatically. When a violation of the Constitution is *not* involved, a balancing test is used, with this Court weighing the interests served by exclusion of the derivative evidence against the interests served by admission of the evidence.

The first question in this case, therefore, is whether a violation of *Miranda*'s warning requirement is a violation

[2] Three federal courts of appeals have held, contrary to the decision of the court of appeals in this case, that the derivative evidence rule does not generally apply in the case of physical evidence fruit of a *Miranda* violation, even after this Court's decision in *Dickerson v. United States*, 530 U.S. 428 (2000). *See United States v. Faulkingham*, 295 F.3d 85 (1st Cir. 2002), *petition for cert. pending*, No. 02-7385 (filed Oct. 7, 2002); *United States v. Sterling*, 283 F.3d 216 (4th Cir.), *cert. denied*, 535 U.S. 931 (2002); *United States v. DeSumma*, 272 F.3d 176 (3d Cir. 2001), *cert. denied*, 535 U.S. 1028 (2002). Several state courts have held, both before and after *Dickerson*, that the derivative evidence rule *does* apply in the case of physical evidence fruit of a *Miranda* violation. *See, e.g., Ex Parte Yarber*, 375 So.2d 1231 (Ala. 1979); *State v. Linck*, 708 N.E.2d 60 (Ind. Ct. App. 1999); *State v. Preston*, 411 A.2d 402 (Me. 1980); *Commonwealth v. White*, 371 N.E.2d 777 (Mass. 1977), *aff'd by an equally divided Court, Massachusetts v. White*, 439 U.S. 280 (1978) (per curiam).

of the Constitution. Because, contrary to the government's argument, precedent establishes that a violation of *Miranda*'s warning requirement is a violation of the Constitution, the derivative evidence rule automatically applies here. The derivative evidence rule also applies under a balancing test, because the interests served by excluding physical evidence derived from a *Miranda* violation outweigh the interests served by admitting it.

II. Because a Violation of *Miranda*'s Warning Requirement is a Violation of the Constitution, the Derivative Evidence Rule Applies.

A. *Miranda*: The Warning Requirement

In *Miranda*, this Court laid down "concrete *constitutional* guidelines for law enforcement agencies and courts to follow." *Miranda*, 384 U.S. at 442 (emphasis added). Specifically, the *Miranda* Court announced a rule that, before subjecting an individual to custodial interrogation, the police must follow "procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself." *Id.* at 439. The procedures must not only "inform accused persons of their right of silence," but also must "assure a continuous opportunity to exercise" this right. *Id.* at 444.[3]

[3] There is one exception to *Miranda*'s warning requirement, namely the public-safety exception announced in *New York v. Quarles*, 467 U.S. 649 (1984). Under that exception, custodial interrogation may be conducted without *Miranda* warnings, if "overriding considerations of public safety" justify immediate questioning. Thus, if unwarned custodial interrogation were necessary to thwart a kidnapping in

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The police may satisfy these requirements by informing a suspect that he 1) "has a right to remain silent," 2) "that any statement he does make may be used as evidence against him," and 3) "that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444. If the police do not inform an in-custody suspect of his rights, any statements that result from the interrogation are inadmissible at trial.[4] *Id.*

A *Miranda* advisement is required prior to custodial interrogation even if a suspect claims to know his rights, because a suspect's perceived awareness of his rights may be neither accurate nor complete. In addition, the delivery of the warning assures even one who knows his rights that "his interrogators are prepared to recognize his privilege should he choose to exercise it." *Id.* at 468. Moreover, the easily and quickly performed act of giving an advisement even to a suspect who claims to know his rights avoids subsequent disputes over what that knowledge, in fact, was. For this reason, courts "will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Id.* at 468. Indeed, in the *Miranda* case itself, this Court held that Ernesto

progress, for example, a *Miranda* advisement would not be required, and the police would not engage in misconduct by failing to give the warnings.

[4] There is one exception to *Miranda*'s exclusionary rule, that being the impeachment exception announced in *Harris v. New York*, 401 U.S. 222 (1971). Under that exception, statements obtained in violation of *Miranda*'s warning requirement may be used to impeach the defendant if he testifies at trial. This exception is identical to the exception to the Fourth Amendment exclusionary rule, which allows illegally seized evidence to be used for impeachment. *See Walder v. United States*, 347 U.S. 62, 65 (1954).

Miranda's unwarned statements were inadmissible despite his having signed a written statement indicating that he had "'full knowledge'" of his "'legal rights.'" *Id.* at 492.

B. A Violation of *Miranda*'s Warning Requirement is a Violation of the Constitution.

More than thirty years after *Miranda* was decided, this Court cleared up confusion that had arisen in the lower courts over whether *Miranda* announced a constitutional rule or merely a "judicially created rule[] of evidence [or] procedure." *Dickerson v. United States*, 530 U.S. 428, 437 (2000). In *Dickerson*, this Court held that "*Miranda* announced a constitutional rule." *Id.* at 444. In doing so, the Court stated its disagreement with the Fourth Circuit Court of Appeals' conclusion that the *Miranda* protections are not constitutionally required. The Court conceded that its references to the *Miranda* warnings as "prophylactic," in cases like *Michigan v. Tucker*, 417 U.S. 433 (1974), and its statement in *Tucker* that the *Miranda* warnings are "not themselves rights protected by the Constitution," were at least partly to blame for the court of appeals having reached the erroneous conclusion that the *Miranda* rule is not constitutionally mandated. *Id.* at 437-38. By so conceding, the Court disavowed its previous statements that *Miranda*'s warning requirement is not itself a right protected by the Constitution.

Notwithstanding the government's argument to the contrary, *Dickerson* makes clear that a violation of *Miranda* is a violation of the Constitution. As a matter of simple logic, if an act violates a constitutional rule – a rule required by the Constitution – the act violates the Constitution. In addition, the Court in *Dickerson* noted that it

has allowed state prisoners to raise *Miranda* violations in federal habeas corpus proceedings, which are available only for persons in custody "'in violation of the Constitution or laws or treaties of the United States.'" *Id.* at 439 n.3 (quoting 28 U.S.C. §2254(a)). The Court's further observation that the *Miranda* rule is not a law or treaty of the United States means that a violation of *Miranda* must be a violation of the Constitution.[5]

C. Because a Violation of *Miranda*'s Warning Requirement is a Violation of the Constitution, the Derivative Evidence Rule Applies.

The application of the derivative evidence rule to constitutional violations is well established. The rule, while most familiar from the Fourth Amendment context, actually has its roots in a Fifth Amendment case, *Counselman v. Hitchcock*, 142 U.S. 547 (1892). In *Counselman*, this Court held that the Fifth Amendment protects against the government's use of evidence *derived from* compelled testimony, not just against the government's use of the compelled testimony itself: "[The Fifth Amendment protects against] that use of compelled testimony which consists in gaining *therefrom* a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party." *Id.* at 586 (emphasis added).

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[5] This Court's recent decision in *Chavez v. Martinez*, 123 S.Ct. 1994 (2003), is not to the contrary. "As a section 1983 action for damages, *Chavez* has no bearing on . . . a criminal proceeding in which the defendant challenges the admissibility [of evidence]." *People v. Neal*, 72 P.3d 280, 290 n.1 (Cal. 2003).

This Court has continued to read the derivative evidence rule broadly in the Fifth Amendment context. For example, in *Hoffman v. United States*, 341 U.S. 479 (1951), this Court explained, "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish *a link in the chain of evidence* needed to prosecute the claimant for a federal crime." *Id.* at 486 (emphasis added). In *Kastigar v. United States*, 406 U.S. 441 (1972), this Court held that "the Fifth Amendment privilege against compulsory self-incrimination ... protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could *lead to* other evidence that might be so used." *Id.* at 444-45 (emphasis added). In *United States v. Hubbell*, 530 U.S. 27 (2000), this court reaffirmed that the Fifth Amendment privilege against self-incrimination protects against both use and *derivative* use, *id.* at 37-38, and the concurring opinion stated that "[a] substantial body of evidence suggests that the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of *any* incriminating evidence." *Id.* at 49 (Thomas, J. concurring) (emphasis added). Most recently, a plurality of this Court noted that "those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or *evidence derived from their statements*) in any subsequent criminal trial." *Chavez v. Martinez*, 123 S.Ct. 1994, 2002 (2003) (plurality opinion) (second emphasis added).

Because a violation of *Miranda*'s warning requirement constitutes a violation of the Fifth Amendment, the derivative evidence rule applies, and the opinion of the court of appeals in this case should be affirmed.

III. Even if a Violation of *Miranda*'s Warning Requirement Were Not a Violation of the Constitution, the Derivative Evidence Rule Would Apply Under the Balancing Test Used to Determine the Applicability of the Rule in Non-Constitutional Contexts.

A. The Balancing Test Used in Non-Constitutional Contexts

When police misconduct does not involve a constitutional violation, this Court applies a balancing test to determine whether the derivative evidence rule applies. This Court first applied such a test in *Nardone v. United States*, 308 U.S. 338 (1939), which involved a violation of a federal statute, and later applied it in *Harrison v. United States*, 392 U.S. 219 (1968), which involved violations of a procedural rule and a court-made prophylactic rule.

1. *Nardone v. United States*, 308 U.S. 338 (1939)

Nardone involved a violation of the Communications Act of 1934, a statute that, among other things, prohibited the interception of interstate wire or radio communications. The case was before the Court twice. The first time it considered *Nardone*, the Court held that evidence obtained in violation of the statute should be excluded in order to deter violations of the statute. *Nardone v. United States*, 302 U.S. 379 (1937). The second time around, the

Court held that the government, being prohibited from introducing the unlawfully intercepted evidence, was also prohibited from using the "fruit" of the unlawfully obtained evidence. The Court in *Nardone* dubbed such derivative evidence the "fruit of the poisonous tree." *Nardone v. United States*, 308 U.S. 338, 341 (1939).

In so holding, the Court articulated a balancing test for use in determining whether to apply the fruit of the poisonous tree doctrine. The doctrine should be applied when the interest in the admission of "evidence logically relevant in criminal prosecutions" is outweighed by any countervailing "public policy expressed in the Constitution *or the law of the land*." *Id.* at 340 (emphasis added). In conducting this balancing, courts should be mindful that any claim for exclusion of logically relevant evidence is "heavily handicapped" and that exclusion must be justified by an overriding interest. *Id.*

Applying this test, the Court in *Nardone* first observed that what was at issue was a "prohibition of particular methods in obtaining evidence." *Id.* If the derivative evidence rule were not applied to a violation of such a prohibition, the Court reasoned, the effect would be "to reduce the scope of [the statute at issue] to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every *derivative* use they may serve." *Id.* (emphasis added). This result would "largely stultify the policy which compelled [this Court's] decision" to exclude the unlawful interceptions in the first place. *Id.* The intercepted conversations themselves had been suppressed, the Court reminded, to "translat[e] into practicality . . . [the] broad considerations of morality and public well-being" that had prompted Congress to ban interception of communications. *Id.* "To forbid the direct

use of methods thus characterized, but to put no curb on their full *indirect* use would only *invite the very methods* deemed 'inconsistent with ethical standards and destructive of personal liberty' " that had led Congress to ban such methods. *Id.* (emphases added). To deter violations of the statute, the Court concluded, it was necessary to apply the rule that " 'knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively." *Id.* at 341 (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)).

2. *Harrison v. United States*, 392 U.S. 219 (1968)

This Court next applied the derivative evidence rule in a non-constitutional context in *Harrison*, 392 U.S. at 219. In *Harrison*, the Court excluded evidence derived from statements obtained "in violation of *Mallory v. United States*," a non-constitutional, procedural rule,[6] and "in violation of a prior en banc decision of the Court of Appeals, *Harling v. United States*."[7] *Harrison*, 392 U.S. at 220 n.2. The rule announced in *Harling* was a court-made, "prophylactic rule" designed to protect the non-criminal, parens patriae function of the juvenile court. *See Harrison v. United States*, 359 F.2d 214, 226 (D.C. Cir. 1965) (on rehearing en banc) (describing *Harling* as having established a "prophylactic rule"). Under the *Harling* rule,

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[6] *See Mallory v. United States*, 354 U.S. 449 (1959).

[7] *See Harling v. United States*, 295 F.2d 161 (D.C. Cir. 1961) (en banc).

statements made by a defendant who is under the jurisdiction of the juvenile court are not admissible if the case is subsequently transferred to adult court.

In *Harrison*, the evidence that was derived from the statements obtained in violation of *Mallory* and *Harling* was the testimony of the defendant from a previous trial. The prosecution introduced the defendant's testimony against him at the subsequent trial, and it was that testimony that this Court held to be inadmissible "fruit." Specifically, this Court held that the defendant's testimony from the previous trial was "the inadmissible fruit of the illegally procured confessions." *Id.* at 221. The confessions were "illegally procured," according to the Court, because they were "obtained in violation of *Mallory v. United States*" and "in violation of a prior en banc decision of the Court of Appeals, *Harling v. United States*." *Id.* at 220 n.2, 221. The Court reasoned that "the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby – the fruit of the poisonous tree, to invoke a time-worn metaphor." *Id.* at 222. Although the defendant "'made a conscious tactical decision to seek acquittal by taking the stand after (his) in-custody statements had been let in,'" *id.* at 223 (quoting *Harrison v. United States*, 387 F.2 203, 210 (D.C. Cir. (1967) (alteration in original)), he did so "to overcome the impact of confessions illegally obtained [by violation of *Mallory* and *Harling*] and hence improperly introduced." *Harrison*, 392 U.S. at 223. Accordingly, "his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible." *Id.*

In deciding to apply the derivative evidence rule, the Court in *Harrison* used a balancing test similar to that employed in *Nardone*. Specifically, the Court balanced the

"deterrence such suppression might achieve" against the obstacles such suppression places in the path of law enforcement. *Id.* at 224 n.10. The Court struck the balance in favor of suppressing the derivative evidence at issue, reasoning that "[t]he exclusion of an illegally procured confession and of any testimony obtained in its wake deprives the Government of nothing to which it has any lawful claim and creates no impediment to legitimate methods of investigating and prosecuting crime." *Id.*

In a later decision, *Oregon v. Elstad*, 470 U.S. 298 (1985), this Court suggested that *Harrison* was based on a violation of the Fifth Amendment, rather than on violations of the non-constitutional rules announced in *Mallory* and *Harling*.[8] *Elstad*, 470 U.S. at 316. A close reading of *Harrison* demonstrates otherwise. First, the opinion in *Harrison* nowhere mentions the words "Fifth Amendment" or even the word "Constitution." Indeed, the only place the words "Fifth Amendment" appear at all in *Harrison* is in a dissenting opinion noting that the majority did *not* "hold that Harrison was compelled to take the stand and incriminate himself contrary to his privilege under the Fifth Amendment." *Harrison*, 392 U.S. at 229 (White, J., dissenting). Second, *Harrison* could not have been based on a violation of the Fifth Amendment's *primary* ban on the use of compelled testimony because, if it had been, there would

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[8] Specifically, the Court stated in *Elstad* that, "[i]f the prosecution has actually violated the defendant's *Fifth Amendment* rights by introducing an inadmissible confession at trial, *compelling* the defendant to testify in rebuttal, the rule announced in *Harrison v. United States*, 392 U.S. 219 (1968), precludes use of that testimony on retrial." *Oregon v. Elstad*, 470 U.S. 298, 316-17 (emphasis added).

have been no need for the Court to discuss, much less to rest its holding on, the *derivative* evidence rule.

In short, both *Harrison* and *Nardone* stand for the proposition that the derivative evidence rule may be applied even in the absence of a constitutional violation, and that, in such a case, application of the rule is determined by balancing the interests served by excluding the evidence against the interests served by admitting it.

B. The Balancing Test Applied: The Interests Served By Excluding Physical Evidence Derived From a Violation of *Miranda*'s Warning Requirement Outweigh the Interests Served By Admitting Such Evidence.

1. *Miranda*'s Warning Requirement Serves the Important Constitutional Interest of Preventing Violations of the Fifth Amendment.

The Fifth Amendment provides in pertinent part that "no person shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. A "criminal case" arises for Fifth Amendment purposes before the actual trial of the defendant. *See Hubbell*, 530 U.S. at 37. Indeed, a "criminal case" must arise even before judicial proceedings have been initiated against a suspect, given the difference in language between the text of the Fifth Amendment and the text of the Sixth Amendment. While the Fifth Amendment uses the phrase "criminal case," the Sixth Amendment uses the phrase "criminal prosecution[]." U.S.CONST. amend. VI. A "criminal prosecution" begins at the latest with the initiation of judicial proceedings. *Brewer v. Williams*, 430 U.S. 387, 398 (1977). The phrase "criminal case" is broader than the phrase

"criminal prosecution." *See Counselman*, 142 U.S. at 563. A "criminal case," therefore, must begin before a "criminal prosecution," and thus must include the stage of a case prior to the initiation of judicial proceedings.[9] The Fifth Amendment's prohibition of compelled self-incrimination in a "criminal case," therefore, must apply to police interrogation.

In *Miranda*, the Court imposed a warning requirement designed to prevent violations of the Fifth Amendment's prohibition of compelled self-incrimination. Specifically, the Court imposed a rule designed to prevent compelled self-incrimination in the inherently coercive setting of custodial interrogation. By requiring police to advise a suspect of his constitutional rights before custodial interrogation and to honor any invocation of those rights, *Miranda*'s warning requirement serves the exceedingly important interest in preventing violations of a "celebrated provision in the Bill of Rights," the Fifth Amendment. *Chavez v. Martinez*, 123 S.Ct. 1994, 2015 (2003) (Kennedy, J., concurring in part and dissenting in part).

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[9] A plurality of this Court took exactly the opposite view in *Chavez v. Martinez*, 123 S.Ct. 1994 (2003), stating that a "criminal case" requires the initiation of legal proceedings. *Chavez*, 123 S.Ct. at 2000 (plurality opinion). This view, which interprets the Fifth Amendment term "criminal case" as being identical to the Sixth Amendment term "criminal prosecution," failed to command a majority of the Court, however. It is also inconsistent with the principle of construction that the use of different words within related provisions generally implies that different meanings were intended. *See United States v. Bean*, 537 U.S. 71, 76 n.4 (2002).

2. Exclusion of Physical Evidence Derived From a Violation of *Miranda*'s Warning Requirement is Necessary to Deter Violations of the Requirement.

a. Exclusion of Derivative Evidence is Necessary to Deter Intentional Violations of *Miranda*'s Warning Requirement.

Absent a clearly applicable derivative evidence rule, the police have an incentive to violate *Miranda* intentionally, in the hopes of securing derivative evidence. *See generally* David A. Wollin, *Policing the Police: Should **Miranda** Violations Bear Fruit?*, 53 OHIO ST. L. J. 805, 843-47 (1992) (describing the incentives). Indeed, in some jurisdictions, police are *trained* to violate *Miranda* to maximize their chances of obtaining derivative evidence that may prove even more valuable than the defendant's statements, which, if unwarned, are inadmissible.

In *State v. Seibert*, 93 S.W.3d 700 (Mo. 2002), *cert. granted*, 123 S.Ct. 2091 (2003), for example, a case this Court will review this term, a Missouri police officer admitted to having interrogated an in-custody murder suspect without first advising her of her *Miranda* rights, based on "a conscious decision to withhold *Miranda* hoping to get an admission of guilt." *Id.* at 702. He had been trained to do this, admitting at the suppression hearing that "an institute, from which he has received interrogation training, has promoted this type of interrogation 'numerous times' and that his current department, as well as those he was with previously, all subscribe to this training." *Id.* The tactic produced the desired results: the unwarned suspect first made an incriminating statement, then waived her *Miranda* rights, then repeated her initial

statement. *Id.* at 702. The second statement was admitted at trial, and the defendant was convicted. *Id.* at 701-02.

The Supreme Court of Missouri reversed, holding that suppression was necessary to deter intentional violations of *Miranda*. The court found it especially significant that the general exclusionary rule barring unwarned statements from the government's case in chief had not deterred the officer from making a conscious decision to violate *Miranda*. *Id.* at 704. The court noted that, being fully aware that any unwarned statement would be inadmissible, and that the suspect might not give a subsequent statement once she was advised of her rights, the officer nonetheless had decided to "roll the dice" and violate *Miranda*. *Id.* The court reasoned that, without suppression of derivative evidence in such circumstances, there was nothing to deter police from deciding that "the desirability of getting information, such as the names of witnesses or location of physical evidence," outweighs the fact that the prosecution will not be able to use an unwarned statement in its case in chief. *Id.*

Police officers in California have likewise been trained to violate *Miranda* in order to secure derivative evidence. One commentator notes a videotape in which a California *prosecutor* instructs police officers on how and why to violate *Miranda* deliberately in certain circumstances. *See* Charles D. Weisselberg, *Saving **Miranda***, 84 CORNELL L. REV. 109, 135, 189 (1998). The prosecutor instructs the officers to consider violating *Miranda*, for example, where the need to recover *physical* evidence outweighs the need for the defendant's statements – where, in the prosecutor's words, "[y]ou've got him, but you'd kinda like to have the gun that he used or the knife that he used or whatever else it was." *Id.* at 190.

It is perfectly proper to violate *Miranda* to obtain the "fruits" of such violations, the prosecutor explains further, because, according to the prosecutor, *Miranda* does not include any derivative evidence rule. The prosecutor states:

> Let me back up for a second because you may have raised an eyebrow when I ran across a couple of these. . . . The *Miranda* exclusionary rule is limited to the defendant's own statement out of his mouth. That is all that is excluded under *Miranda*. It doesn't have a fruits of the poisonous tree theory attached to it the way constitutional violations do. When you violate *Miranda,* you're not violating the Constitution. . . . [A]ll you're violating is a court decision controlling admissibility of evidence. So you're not doing anything unlawful, you're not doing anything illegal, you're not violating anybody's civil rights, you're doing nothing improper. . . . *Oregon v. Elstad*, from the U.S. Supreme Court, and a bunch of federal cases and some state cases . . . a lot of cases have said 'the fruit of the poisonous tree' derivative products doctrine does not apply to *Miranda* violations. All we lose is the statement taken in violation of *Miranda*. We do not lose physical evidence that resulted from that.

Id. at 191-92.

The Supreme Court of California recently took note of the official encouragement of *Miranda* violations. In reversing a defendant's conviction due, in part, to the taking of a statement in deliberate violation of *Miranda*, the court stated that "at least until recently the employment of interrogation techniques in deliberate violation of

Miranda as a 'useful' but improper 'tool' has not been isolated or limited . . . , and worse yet has not been without widespread official encouragement." *People v. Neal*, 72 P.3d 280, 290 n.5 (Cal. 2003).

As the Missouri and California examples show, "[t]o forbid the direct use of methods . . . but to put no curb on their full indirect use . . . only invite[s] the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'" *Nardone*, 308 U.S. at 340. As those examples further show, the perceived lack of any curb on the indirect use of statements obtained in violation of *Miranda* has had exactly the effect this Court warned of in *Nardone*. It has invited the very methods this Court in *Miranda* deemed "destructive of personal liberty." The perceived lack of any limit on the indirect use of *Miranda*-violative statements has been treated by prosecutors and police officers like the ones in the above examples as a veritable license to violate *Miranda*. For this reason, application of the derivative evidence rule to physical evidence resulting from a *Miranda* violation is necessary to deter intentional violations of *Miranda*.

b. To Deter Violations of *Miranda*'s Warning Requirement, Exclusion of Derivative *Physical* Evidence is Especially Important.

Applying the derivative evidence rule to physical evidence fruit of a *Miranda* violation is more important than applying the rule to other types of "fruit," because police have more of an incentive to ignore the requirements of *Miranda* in the case of physical evidence. In the case of physical evidence, the link between the unwarned questioning and the recovery of the derivative evidence is

direct, whereas, in the case of testimonial evidence, recovery of the derivative evidence depends on the exercise of volition by a human being. If the police learn of the location of a piece of physical evidence, for example, they can simply retrieve it. If the police learn of the identity of a witness, however, the evidentiary value of that information depends on an exercise of volition by the witness – the witness's decision to cooperate. As this Court explained, in a decision holding that the derivative evidence rule is inapplicable to a Fourth Amendment violation that leads to the discovery of a live witness:

> The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence.

United States v. Ceccolini, 435 U.S. 268, 277 (1978) (quoting *Smith v. United States*, 117 U.S. App. D.C. 1, 3-4, 324 F.2d 879, 881-82 (1963) (Burger, J.)).

Similarly, as this Court recognized in *Elstad*, a human exercise of volition separates unwarned questioning from a subsequent, arguably derivative statement of the suspect. The exercise of volition in a subsequent-statement case is the suspect's decision to waive his rights, once he is finally advised of them, and his decision to repeat his earlier, unwarned statement. In sharp contrast, an unwarned

statement regarding the location of inanimate, physical evidence leads the police directly to that evidence; no intervening act of volition is required.

Because police have more of an incentive to ignore the requirements of *Miranda* in the case of physical evidence fruit, there is a greater need for deterrence than in the case of other types of "fruit." In addition, even within the category of physical evidence fruit, there is a greater need for deterrence where the physical evidence constitutes the very essence of the offense. Physical evidence constitutes the very essence of the offense when that offense is possession of a prohibited object. When the offense is possession of a prohibited object, the physical evidence in question is the heart of the prosecution's case.

In this case, for example, evidence that the gun was found on a shelf in Mr. Patane's bedroom is virtually all the prosecution needs to prove the offense. Evidence of Mr. Patane's statements would not be necessary, because the presence of the gun on a shelf in his bedroom would be an equal, if not better, *substitute* for the statements. As the court of appeals explained:

> As a practical matter, the inability to offer Patane's statements in this case affords no deterrence, because the ability to offer the physical evidence (the gun) renders the statements superfluous to conviction.
>
> . . . From a practical perspective, we see little difference between the confessional statement "The Glock is in my bedroom on a shelf," which even the Government concedes is clearly excluded under *Miranda* and *Wong Sun*, and the Government's introduction of the Glock found in the defendant's bedroom on the shelf as a result

> of his unconstitutionally obtained confession. If anything, to adopt the Government's rule would allow it to make *greater* use of the confession than merely introducing the words themselves.

Patane, 304 F.3d at 1026-27.

In a possession case, then, the defendant's disclosure of the location of a prohibited object becomes the equivalent of a confession by the defendant to possession of the object, at least where, as is the case here, the location of the object establishes the defendant's possession of it. Police have an incentive to ignore *Miranda* in such circumstances because securing and being able to use the physical evidence at trial is more important than securing and being able to use statements of the defendant at trial.

Given the incentive that police have to ignore *Miranda* in possession cases, the exclusion of physical evidence fruit in such cases is particularly necessary to deter *Miranda* violations. Particularly in possession cases, "suppression of the statement alone [does not] provide[] deterrence sufficient to protect citizens' constitutional privilege against self-incrimination." *Id.* at 1028. As the court of appeals recognized in this case, "*Miranda*'s deterrent purpose would not be vindicated meaningfully by suppression only of Patane's statement." *Id.* at 1029. Suppression of the gun is therefore required. *Id.*

c. Exclusion of Derivative Physical Evidence is Necessary to Deter Even Negligent Violations of *Miranda*'s Warning Requirement.

Application of the derivative evidence rule is also necessary to deter negligent violations of *Miranda*. As this

Court stated in *Michigan v. Tucker*, 417 U.S. 433 (1974), suppressing evidence gained as the result of negligent conduct by the police serves "to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused." *Id.* at 447. If physical evidence fruit of a negligent *Miranda* violation is admissible, police departments have less incentive to train officers to comply with *Miranda*. As the court of appeals recognized in this case, suppression of physical fruit of even a negligent *Miranda* violation is necessary "to ensure that officers . . . properly are trained to protect . . . the constitutional rights of citizens." *Patane*, 304 F.3d at 1028; *cf. United States v. Leon*, 468 U.S. 897, 919 n.20 (1984) (quoting with approval Professor Israel's observation in the Fourth Amendment context that, "The key to the [exclusionary] rule's effectiveness as a deterrent lies . . . in the impetus it has provided to police training programs that make officers aware of the limits imposed by the fourth amendment and emphasize the need to operate within those limits.") (alteration in original).

In addition, applying the derivative evidence rule to physical evidence fruit of negligent *Miranda* violations will avoid the difficulty that would necessarily arise in attempting to distinguish between negligent and intentional violations of *Miranda*. It is important to avoid such distinctions, even the government agrees, because a rule that requires such line-drawing would cause the parties and the court to become "embroiled in collateral litigation over the mental state of particular federal or state agents who did not administer *Miranda* warnings in their initial questioning of the defendant." Brief for the U.S. as Amicus Curiae, *Missouri v. Seibert*, 93 S.W.3d 700 (Mo. 2002), *cert. granted*, 123 S.Ct. 2091 (2003), 2003 WL 21840207 at *2.

Moreover, "in cases where the failure to administer *Miranda* warnings was calculated, obtaining evidence of such deliberate violations of *Miranda* often would be difficult or impossible." *Patane*, 304 F.3d at 1029.

Distinguishing between negligent and intentional *Miranda* violations would also run counter to a long line of *Miranda* cases rejecting distinctions based on the subjective intent of the police officer conducting the interrogation. *See, e.g., Rhode Island v. Innis*, 446 U.S. 291, 300-02 (1980) ("underlying intent of the police" is irrelevant to determination of whether "interrogation" occurred); *New York v. Quarles*, 467 U.S. 649, 655-56 (1984) (public-safety exception "does not depend upon the motivation of the individual officers involved"); *Moran v. Burbine*, 475 U.S. 412, 423 (1986) ("[W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights."); *Stansbury v. California*, 511 U.S. 318, 323-25 (1994) (per curiam) (in determining whether a suspect is "in custody," subjective and undisclosed views of the officers are not relevant); *see also Elstad*, 470 U.S. at 317 ("We do not imply that good faith excuses a failure to administer *Miranda* warnings. . . . ").

Finally, such line-drawing is ill-advised, as the government again agrees, because "[u]nwarned questioning has the same effect on a suspect whether the officer's failure to warn was deliberate or the result of an oversight." Brief for U.S. as Amicus Curiae, *Missouri v. Siebert*, 93 S.W.3d 700 (Mo. 2002), *cert. granted*, 123 S.Ct. 2091 (2003), 2003 WL 21840207 at *9. "A suspect is affected by the methods that an officer uses to interrogate him, not by the officer's subjective mental state." *Id.* at *17.

3. The Costs of Excluding Physical Evidence Derived From a Violation of *Miranda*'s Warning Requirement Do Not Outweigh the Benefits of Exclusion.

Application of the derivative evidence rule to the physical fruit of a *Miranda* violation exacts the same cost as application of any exclusionary rule – relevant, reliable evidence is kept from the factfinder. *See, e.g., Rogers v. Richmond*, 365 U.S. 534, 545 (1961) (holding that an unconstitutionally obtained confession must be excluded regardless of its reliability). As is the case with any exclusionary rule, this cost is justified when, as is the case here, exclusion of evidence is necessary to assure compliance with a rule required by the Constitution. As this Court has explained, the "[exclusionary] rule has primarily rested on the judgment that the importance of deterring police conduct that may invade the constitutional rights of individuals throughout the community outweighs the importance of securing the conviction of the specific defendant on trial." *United States v. Caceres*, 440 U.S. 741, 754 (1979). In this case, the importance of deterring police noncompliance with *Miranda*, which noncompliance "may invade the constitutional rights of individuals throughout the community," *id.*, outweighs the importance of securing the conviction of Mr. Patane, assuming the government is, in fact, unable to secure his conviction without the gun.

In addition, the cost of excluding derivative *physical* evidence is not as high as the cost of excluding other types of derivative evidence, such as the testimony of a live witness. The cost of excluding the testimony of a witness is higher than the cost of excluding physical evidence because "[unlike] guns or documents which remain hidden from view until one turns over a sofa or opens a filing

cabinet[,] [w]itnesses can, and often do, come forward and offer evidence entirely of their own volition." *Ceccolini*, 435 U.S. at 276. Consequently, while suppression of the testimony of a witness "would perpetually disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the [violation] or the evidence discovered thereby," suppression of physical evidence is directly related to the violation that produced it. *Id.* at 277. As a result, "[t]he exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an *inanimate object*." *Id.* at 280 (emphasis added).

Finally, the government overstates the cost of excluding the physical evidence in this case because, contrary to the government's claim, prosecution of Mr. Patane would still be possible even if the gun is suppressed. Under Tenth Circuit case law, the government need not introduce the firearm itself to obtain a felon-in-possession-of-a-firearm conviction. *See United States v. Gregg*, 803 F.2d 568, 571 (10th Cir. 1986). Testimony of a witness who saw the defendant in possession of the firearm is, instead, sufficient for conviction. *Id.* In this case, Mr. Patane's ex-girlfriend, Linda O'Donnell, could be a witness for the government because, according to her statements to the police, she was with Mr. Patane when he purchased the gun at a gun show. In addition, if Mr. Patane took the stand and denied possessing the gun, his statements regarding the location of the gun could be used to impeach him. *See Harris v. New York*, 401 U.S. 222, 226 (1971). Thus, although suppression of the gun derived from the

Miranda violation would weaken the government's case, it would not, as the government claims, preclude prosecution.[10]

In sum, the important constitutional interest served by excluding physical evidence derived from a violation of *Miranda*'s warning requirement far outweighs the cost of exclusion. Given this circumstance, the opinion of the court of appeals applying the derivative evidence rule in this case should be affirmed.

IV. The Government's Reliance on *Tucker* and *Elstad* is Misplaced Because Neither Case Involved Derivative *Physical* Evidence.

In its brief, the government contends that *Tucker*, 417 U.S. at 433, and *Elstad*, 470 U.S. at 298, support its argument that the derivative evidence rule does not apply to physical evidence fruit of a *Miranda* violation. The government's reliance on the two cases is misplaced. Because neither case involved derivative *physical* evidence, the balance of interests in the two cases was different from the balance of interests in this case.

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[10] In addition to satisfying the possession element of the offense, the testimony of Linda O'Donnell could also satisfy the interstate commerce element. According to Ms. O'Donnell's statements to the police, Mr. Patane's gun was a Glock, a gun that is manufactured in Austria and shipped to Georgia for distribution in the United States. *See Spence v. Glock*, 227 F.3d 308, 310 (5th Cir. 2000). Together with testimony that Glocks are manufactured and distributed outside Colorado, Ms. O'Donnell's testimony that Mr. Patane possessed a Glock in Colorado would be sufficient under *United States v. Gregg*, 803 F.2d 568, 571 (10th Cir. 1986), to show that the gun had traveled in interstate commerce.

A. *Michigan v. Tucker*, 417 U.S. 433 (1974)

In *Tucker*, this Court held that the derivative evidence rule does not apply to live-witness fruit of a violation of *Miranda*'s warning requirement, at least when the "*Miranda* violation" occurred before *Miranda* was even decided. In *Tucker*, the defendant was arrested prior to this Court's decision in *Miranda*. The police, therefore, did not fully advise the defendant of his "*Miranda* rights" before interrogating him. The defendant's responses to the questioning led the police to a person who ultimately became the government's star witness at trial.

The Court began its analysis in *Tucker* by considering whether the failure to provide full *Miranda* warnings "directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only prophylactic rules developed to protect that right." *Tucker*, 417 U.S. at 439. The Court concluded that a *Miranda* violation does not in itself deprive an accused of "his privilege against compulsory self-incrimination as such, but rather fail[s] to make available to him the full measure of procedural safeguards associated with that right." *Id.* at 444. Precedents applying the derivative evidence rule to constitutional violations, therefore, did not control.[11] *Id.* at 446.

The Court then used a balancing test to determine whether the derivative evidence rule should be applied. In assessing the benefits of applying the derivative evidence

[11] As noted above, this Court later clarified in *Dickerson* that *Tucker* does not mean that the procedural safeguards of *Miranda* are not required by the Constitution. *Dickerson*, 530 U.S. at 437-38.

rule to the "*Miranda*" violation at hand, the Court focused on the primary purpose of the Fifth Amendment exclusionary rule, which is to deter violations of the Fifth Amendment. The Court emphasized that "'[t]he rule is calculated to prevent, not to repair.'" *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 347 (1974)). The Court emphasized further that the purpose of the exclusionary rule "is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it.'" *Id.* But, the Court cautioned, "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." 417 U.S. at 447. Under the circumstances of *Tucker*, however, the interest in deterring violations of *Miranda's* warning requirement was minimal, the Court reasoned, given that *Miranda* had not even been decided at the time the officers questioned the defendant. *Id.* Unless police officers are expected to comply with cases that do not yet exist, the Court reasoned further, the police in *Tucker* were not even negligent in failing to comply with *Miranda* at the time they questioned the defendant. *Id.* The Court concluded that the "strong interest . . . of making available to the trier of fact all concededly relevant and trustworthy evidence" and "'the interest in the effective prosecution of criminals'" therefore outweighed "the need to provide an effective sanction to a constitutional right" under the circumstances in *Tucker*. *Id.* at 450-51 (quoting *Jenkins v. Delaware*, 395 U.S. 213, 221 (1969)).

Tucker is distinguishable from this case. First, unlike in *Tucker*, the purpose of the Fifth Amendment exclusionary rule – to deter police from violating the Fifth

Amendment – *is* served by applying the derivative evidence rule in this case. Unlike in *Tucker*, *Miranda* had been on the books for thirty-five years at the time Detective Benner questioned Mr. Patane. Indeed, by then, *Miranda* had become "embedded in routine police practice to the point where the warnings [had] become part of our national culture." *Dickerson*, 530 U.S. at 443. Detective Benner was charged with knowing that, before he subjected Mr. Patane to custodial interrogation, he was required to advise him, not only of his right to remain silent, but also of his right to counsel, retained or appointed. *See Duckworth v. Eagan*, 492 U.S. 195, 202-04 (1989) (while rights advisement need not be verbatim recital of the precise language contained in the *Miranda* opinion, it must include advisement of the right to counsel); *Miranda* 384 U.S. at 471 (stating that advising a custodial suspect of his right to counsel is an "absolute prerequisite" to interrogation.)

Second, unlike in *Tucker*, the fruit of the interrogation in this case was physical evidence rather than a live witness. As discussed above, the link between improper questioning and the securing of derivative evidence is more direct in the case of physical evidence than it is in the case of a live witness because the evidentiary value of physical evidence does not depend on a human exercise of volition. Consequently, there is more incentive to engage in improper questioning when the goal is to locate concrete, physical evidence rather than a witness, and there is a correspondingly greater need for deterrence in the case of physical evidence.

That *Tucker* did not shed significant light on the question of the admissibility of *physical* evidence derived from a *Miranda* violation was confirmed when, just four

years after *Tucker*, this Court split four to four on that very question. *See Massachusetts v. White*, 439 U.S. 280 (1978) (per curiam). The still-undecided nature of the question was confirmed again, ten years later, in *Patterson v. United States*, 485 U.S. 922 (1988) (White, J., dissenting from denial of certiorari). In *Patterson*, Justice White noted that, "In *Michigan v. Tucker*, this Court expressly left open the question of the admissibility of physical evidence obtained as a result of an interrogation conducted contrary to the rules set forth in *Miranda v. Arizona*." *Id.* at 922 (citation omitted).

In sum, *Tucker* involved different interests than are involved here, and *Tucker*'s weighing of those interests does not control the resolution of this case.

B. *Oregon v. Elstad*, 470 U.S. 298 (1985)

The *Elstad* case, on which the government also relies, is equally inapposite. In *Elstad*, this Court held that the derivative evidence rule does not apply to a *Miranda* violation yielding a *subsequent statement by the accused* as its fruit. In *Elstad*, the police went to the defendant's home to execute a warrant for his arrest but did not read him his *Miranda* rights. Instead, an officer questioned the defendant about the burglary for which they had come to arrest him, and the defendant admitted his involvement. The police then took the defendant to the sheriff's office, where they questioned him again. This time, the officers advised the defendant of his *Miranda* rights before questioning him. After the defendant signed a written waiver of his rights, he gave a complete oral statement and later reviewed, corrected, and signed a written confession.

This Court granted certiorari "to decide whether an initial failure of law enforcement officers to administer the warnings required by *Miranda v. Arizona*, without more, 'taints' subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights." *Elstad*, 470 U.S. at 300 (citation omitted). This Court held that it does not. *Id.*

The *Elstad* Court began its analysis by noting that the fruit of the poisonous tree metaphor is familiar "from the Fourth Amendment context." *Id.* at 303. Although the *Elstad* Court did not so state, the fruit of the poisonous tree doctrine was also familiar at that time from the statutory context from which it originated, *see Nardone*, 308 U.S. at 341 (first using the "fruit of the poisonous tree" metaphor); from the regulatory context, *see Harrison*, 392 U.S. at 219 (applying the fruit of the poisonous tree doctrine to violations of court-made and legislative rules); and from the Sixth Amendment context, *see United States v. Wade*, 388 U.S. 218 (1967) (applying the fruit of the poisonous tree doctrine to a Sixth Amendment violation). The *Elstad* Court also did not mention that the "derivative evidence rule," which preceded, and operates in the same way as, the "fruit of the poisonous tree doctrine," originated in the context of the *Fifth* Amendment, not the Fourth Amendment. *See Counselman*, 142 U.S. at 586 (Fifth Amendment case first discussing the derivative evidence doctrine); *see also Hubbell*, 530 U.S. at 37-38 (applying the derivative evidence doctrine in a Fifth Amendment context); *Kastigar*, 406 U.S. at 444-45 (same); *Murphy v. Waterfront Comm'n of New York*, 378 U.S. 52, 79 (1964) (same).

After commenting on the familiarity of the fruit of the poisonous tree doctrine from the Fourth Amendment

context, the Court noted that only constitutional violations *necessarily* call for application of the fruit of the poisonous tree doctrine. *Elstad*, 470 U.S. at 305-06. The Court did not state that only if there is a constitutional violation can the fruit of the poisonous tree doctrine apply. Instead, after stating that a violation of *Miranda*'s warning requirement is not a violation of the Constitution itself, the Court proceeded to apply a balancing test to determine whether the derivative evidence rule should be applied. *Id.* at 312. The circumstances under which the Court applied the balancing test were: 1) a violation of *Miranda*'s warning requirement, 2) that was subsequently cured by full compliance with *Miranda*, and 3) that was followed by a knowing, intelligent, and voluntary statement of the accused. The Court found that the interest in the admission of the subsequent statement in these circumstances outweighed the interest in exclusion because, to hold otherwise, would be to "effectively immunize[ ] a suspect who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver of the privilege of remaining silent." *Id.* This immunity, the Court reasoned, would "come[ ] at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself." *Id.* (emphasis in original). The specific holding of the Court in *Elstad* was that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id.* at 318.

Elstad is distinguishable from this case. First, unlike in *Elstad*, the *Miranda* violation in this case was never "cured" by subsequent compliance with *Miranda*. Second,

unlike in *Elstad*, the connection between the improper questioning and the obtaining of the derivative evidence was not broken by an intervening exercise of volition. Mr. Patane's alleged consent to the entry of his home and to the seizure of his gun was not an exercise of volition because any consent that he gave was not voluntary. Any consent that he gave was also "come at by exploitation of [the primary] illegality," *see Wong Sun v. United States*, 371 U.S. 471, 488 (1963), the primary illegality being the unwarned questioning that immediately preceded the alleged consent. Consequently, Mr. Patane's alleged consent to the warrantless entry of his home and to the seizure of his gun was not a voluntary act capable of removing the taint of the preceding questioning that took place in violation of *Miranda*.

Although *Elstad* did not involve physical evidence, the Court made opaque reference to the question of physical-evidence fruit of a *Miranda* violation. The Court commented, for example, that *Tucker*'s reasoning that exclusion of the testimony of a third-party witness would not serve the purpose of the derivative evidence rule "applies with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation is neither a witness, nor an article of evidence, but the accused's own voluntary testimony." *Elstad*, 470 U.S. at 308. But, as the dissent in *Elstad* cautioned, the case "surely ought not be read as also foreclosing application of the traditional derivative-evidence presumption to *physical* evidence obtained as a proximate result of a *Miranda* violation," because the Court in *Elstad* "relie[d] heavily on individual 'volition' as an insulating factor in successive-confession cases[,] . . . [a] factor [that] is altogether missing in the context of

inanimate evidence." *Id.* at 347 n.29 (Brennan, J., dissenting) (emphasis added).

The Court in *Elstad* also made a passing reference to fruits of a *Miranda* violation in general, stating that a *Miranda* violation "does not require that the statements *and their fruits* be discarded as inherently tainted." *Id.* at 307 (emphasis added). For example, the Court observed, while unwarned statements must be "discarded" for use in the government's case in chief, they may still be used to impeach the defendant if he testifies.[12] *Id.* Read in context, it is clear that the Court's observation that unwarned statements and their fruits need not be discarded for *all* purposes was not intended to mean either that unwarned statements are always admissible, which they clearly are not, or that the fruits of such statements are always admissible.

That *Elstad* did not shed significant light on the question of the admissibility of *physical* evidence derived from a *Miranda* violation is supported by Justice White's subsequent observation, in *Patterson*, that, "[w]hile *Elstad* has been considered illuminating by some Courts of Appeals on the question of admissibility of physical evidence yielded from a *Miranda* violation, that decision did not squarely address the question presented here, and in fact, left the matter open." *Patterson*, 485 U.S. at 923 (internal citations omitted).

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[12] As noted above, this is true even in the Fourth Amendment context, where, as is the case with evidence obtained in violation of *Miranda*, the evidence may still be used for impeachment. *See Walder v. United States*, 347 U.S. at 65.

Elstad, like *Tucker*, involved a different balance of interests than is present in this case and, therefore, does not control.[13]

V. The Government's Argument that a Police Officer May Conduct a Custodial Interrogation Without First Advising the Suspect of His Rights is Incorrect.

The government contends, for the first time in the history of this case, that a police officer's failure to advise a suspect of his rights before subjecting him to custodial interrogation does not violate the rule announced in *Miranda*. According to the government, so-called *Miranda* violations consisting of a police officer's failure to warn are not actually violations at all, because *Miranda* does not, in fact, include any requirement that warnings be given. All *Miranda* requires, according to the government, is the exclusion at trial of statements that are not preceded by warnings. Police officers are free, under the government's

[13] The government also relies on *Schmerber v. California*, 384 U.S. 757 (1966), and its progeny in arguing that physical evidence derived from a *Miranda* violation should not be suppressed. This reliance is even more misplaced than the government's reliance on *Elstad* and *Tucker*. In *Schmerber*, this Court held that the withdrawal of blood from the defendant and the admission of its analysis at trial did not violate the Self-Incrimination Clause because neither act compelled the defendant to provide "evidence of a testimonial or communicative nature." *Id.* at 761. No rule of any kind was violated in *Schmerber*, much less a constitutional rule. There was no "tree" in *Schmerber*, much less any "fruit." In this case, by contrast, the words of Mr. Patane that directed Detective Benner to the gun were clearly testimonial or communicative in nature, and the Fifth Amendment, thus, is clearly implicated. Moreover, there *was* a violation in this case, a violation of the constitutional rule of *Miranda*.

theory, to interrogate an in-custody suspect without first providing warnings, and they do not engage in misconduct when they do so. Given that unwarned custodial interrogation is perfectly proper, the government's theory continues, there is no need to deter it.

The government's argument lacks merit. First, it is inconsistent with the *Miranda* decision itself. Second, it is inconsistent with more than three decades of case law interpreting *Miranda*.

A. *Miranda* Announced a Warning Requirement and Not Merely an Evidentiary Rule.

The *Miranda* decision itself makes clear that the Court was announcing a two-part rule. The first part *requires* police officers to advise suspects of their rights before subjecting them to custodial interrogation. The second part dictates the consequences of failing to comply with the first part: statements taken in violation of the warning requirement must be excluded at trial. The government's argument, which focuses exclusively on the second part of the *Miranda* rule and ignores the first, is belied by the language of the *Miranda* decision itself.

In the very first paragraph of *Miranda*, the Court states that its decision "deal[s] with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation *and* the *necessity for procedures* which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself." *Miranda*, 384 U.S. at 439 (emphases added). The Court also states in the introductory section of the opinion that the Court granted certiorari, in part, "to give concrete constitutional

guidelines for *law enforcement agencies* and courts *to follow*." *Id.* at 441-42 (emphases added).

The Court continues in the same vein throughout the opinion, emphasizing that the rule it is announcing applies to the conduct of police officers as well as to trial judges determining the admissibility or inadmissibility of evidence. The Court states:

> – The principles announced today deal with *the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation* while in custody at the station or otherwise deprived of his freedom of action in any significant way. . . . [T]he safeguards to be erected about the privilege must come into play *at this point*.
>
> – The *limits we have placed on the interrogation process* should not constitute an undue interference with a proper system of law enforcement.
>
> – To summarize, we *hold* that *when an individual is taken into custody . . . and is subjected to questioning, the privilege against self-incrimination is jeopardized. [P]rocedural safeguards must be employed* to protect the privilege. . . .

Id. at 477, 478-79 (emphases added).

The Court also makes clear throughout the opinion that the warning requirement it announces is exactly that – a *requirement*. Thus, the Court states:

> – In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused *must be* adequately and effectively apprised of his rights

> and the exercise of those rights must be fully honored.
>
> – The *requirement of* warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege. . . .
>
> – [T]his warning [of the right to counsel] is an *absolute prerequisite* to interrogation.
>
> – [W]e *hold* that an individual held for interrogation *must be* clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. . . .

Id. at 467, 471, 476 (emphases added).

In sum, notwithstanding the government's argument to the contrary, *Miranda* itself makes clear that it was announcing a warning requirement, and not just an evidentiary rule.[14]

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[14] Although in the body of its brief the government insists that *Miranda* did not announce a warning requirement, the government's statement of the question presented in this case implicitly acknowledges that *Miranda* includes a warning requirement, and that it is not just an evidentiary rule. The government states the question presented as "[w]hether a failure to give a suspect the warnings *prescribed by Miranda v. Arizona* requires the suppression of physical evidence derived from the suspect's unwarned but voluntary statement." Petitioner's Brief at (I) (emphasis added; citation omitted). If the warnings are "prescribed" by *Miranda*, they are required by *Miranda*.

B. This Court has Consistently Interpreted *Miranda* as Having Announced a Warning Requirement and Not Merely an Evidentiary Rule.

In more than three decades of case law following the *Miranda* decision, this Court has consistently interpreted that decision as having announced a rule requiring that suspects be advised of their rights before they are subjected to custodial interrogation. From a case decided just one week after *Miranda* to this Court's most recent pronouncements, this Court has made clear that *Miranda* sets out a warning requirement and not merely a rule for determining the admissibility of evidence at trial. *See, e.g.*, *Johnson v. New Jersey*, 384 U.S. 719, 726 (1966) ("In view of the standards announced one week ago concerning *the warnings which must be given* prior to in-custody interrogation, this case also obliges us to determine whether *Miranda* should be accorded retroactive application.") (emphasis added); *Quarles*, 467 U.S. at 656 ("The *Miranda* decision was based in large part on this Court's view that the warnings which it *required* police to give to suspects in custody would reduce the likelihood that the suspects would fall victim to *constitutionally impermissible practices of police interrogation*. . . . ") (emphases added); *Moran*, 475 U.S. at 420 ("*Miranda* imposed *on the police* an *obligation* to follow certain procedures in their dealings with the accused") (emphasis added); *Colorado v. Spring*, 479 U.S. 564, 567 n.1 (1987) ("Under this Court's decision in *Miranda* . . . , prior to a custodial interrogation a criminal suspect *must* [be advised of his rights]") (emphasis added); *Teague v. Lane*, 489 U.S. 288, 303 (1989) ("[I]n *Miranda* . . . , the Court held that, absent other effective measures to protect the Fifth Amendment privilege against self-incrimination, a person in custody *must* be

warned prior to interrogation that he has certain rights, including the right to remain silent.") (emphasis added); *Davis v. United States*, 512 U.S. 452, 457 (1994) ("[W]e held in *Miranda* . . . that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police *must* explain this right to him before questioning begins.") (emphasis added); *Thompson v. Keohane*, 516 U.S. 99, 107 (1995) ("To safeguard the uncounseled individual's Fifth Amendment privilege against self-incrimination, the *Miranda* Court held, suspects interrogated while in police custody *must* be told [of their rights].") (emphasis added); *Dickerson*, 530 U.S. at 440 ("[T]he *Miranda* Court concluded that, '[i]n order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused *must* be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.'") (emphasis added); *see also Chavez*, 123 S.Ct. at 2013 (2003) (Kennedy, J., concurring in part and dissenting in part) ("The *Miranda* warning, as is now well settled, is a constitutional *requirement* adopted to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause.") (emphasis added).

Contrary to the government's argument, *Miranda* and its progeny simply do not allow police officers to perform a cost/benefit analysis before deciding whether to give warnings before conducting custodial interrogation in a particular case. Instead, the warnings are a constitutional prerequisite to custodial interrogation. Police officers violate a constitutional rule by failing to give *Miranda* warnings before custodial interrogation. When unwarned custodial interrogation produces physical evidence –

particularly physical evidence that is the essence of the offense – the physical evidence must be suppressed. Given this, the gun Detective Benner recovered from Mr. Patane's bedroom must be suppressed, because it was the direct result of Detective Benner's questioning of Mr. Patane in violation of the constitutional rule of *Miranda*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SAMUEL FRANCIS PATANE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 02-1183

UNITED STATES OF AMERICA, PETITIONER

v.

SAMUEL FRANCIS PATANE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The *Miranda* rule requires the exclusion of unwarned statements resulting from custodial interrogation, in order to guard against the risk that a defendant's compelled statement will be introduced by the government to prove his guilt. Respondent and his amici urge that the exclusionary rule of *Miranda* now be greatly extended to encompass suppression not only of the unwarned statement, but also of reliable physical evidence derived from the unwarned statement. This Court has not previously taken that step, and it should decline to do so here.

It is not the premise of *Miranda* that all unwarned statements provided during custodial interrogation have actually been compelled, such that their introduction into evidence would necessarily violate the Fifth Amendment. Rather, *Miranda* responds to the "unacceptably great" risk of intro-

ducing a compelled statement. *Dickerson* v. *United States*, 530 U.S. 428, 442 (2000). *Miranda* thus creates a limited exclusionary rule to protect the Self-Incrimination Clause's core right. When uses of unwarned statements in other contexts are at issue, the Court has relied on the traditional totality of the circumstances test to measure whether the statement is voluntary. That analysis, as well as the overwhelming weight of authority in the courts of appeals both before and after *Dickerson* rejecting a rule requiring suppression of derivative physical evidence, makes clear that "[t]he exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy." *Chavez* v. *Martinez*, 123 S. Ct. 1994, 2013 (2003) (Kennedy, J., concurring in part and dissenting in part).

Even if respondent were correct that *Miranda* should be viewed as a rule governing the conduct of the police and that the exclusion of unwarned statements taken in custodial interrogation is based on a deterrence rationale, there still would be no justification for extending the *Miranda* exclusionary rule to derivative physical evidence. The additional damage done to the truthseeking function of the criminal trial would be profound, and it is not justified by the limited incremental deterrence that would be achieved. The exclusion of the accused's unwarned statements is strong enough medicine for a rule that operates without actual proof of the "compelled" testimony that the Fifth Amendment addresses. No adequate justification exists for extending *Miranda* further at this late date.

A. The *Miranda* Rule Protects Against A Core Violation Of The Self-Incrimination Clause—The Introduction Of A Compelled Statement At Trial

Respondent notes (Br. 13-15) that in the immunity context, the Self-Incrimination Clause requires the suppression not only of compelled statements, but also of evidence de-

rived from such statements. See, *e.g.*, *United States* v. *Hubbell*, 530 U.S. 27, 37 (2000); *Kastigar* v. *United States*, 406 U.S. 441, 444-445 (1972). Respondent then argues (Br. 15) that because the constitutional rule of *Miranda* is based on the Self-Incrimination Clause, "the derivative evidence rule applies" in that context too. See also Brennan Center Amicus Br. 17-19; NACDL Amicus Br. 16-17.

1. Respondent's argument disregards the distinctly different function of *Miranda*, on the one hand, and rules excluding evidence derived from compelled testimony, on the other. *Hubbell* and *Kastigar* address the scope of immunity when the government directly compels testimony or requires the defendant to engage in testimonial acts of production. When the government compels such testimony or testimonial acts, the Fifth Amendment rule is settled that the government may not obtain an evidentiary advantage based on its having required production of the testimony before trial, and the testimony and its fruits therefore must be suppressed. See U.S. Br. 25.

2. *Miranda* cases differ from *Hubbell* and *Kastigar*, because "the breach of the *Miranda* procedures * * * involve[s] no actual compulsion." *Oregon* v. *Elstad*, 470 U.S. 298, 308 (1985); see *id.* at 306-307 n.1 (failure to give warnings "does not constitute coercion"), 310 ("The failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced."). Rather than establishing that unwarned confessions are in fact compelled, the *Miranda* rule protects against "the *risk* of overlooking an involuntary custodial confession." *Dickerson*, 530 U.S. at 442 (emphasis added); see also *id.* at 435 ("the risk that an individual will not be 'accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself'"); *Chavez*, 123 S. Ct. at 2007 (Souter, J., concurring in the judgment) (*Miranda* rule "express[es] a judgment that the core guarantee, or the judicial capacity to

protect it would be placed at some risk in the absence of such complementary protection"). Unlike the rules in *Hubbell* or *Kastigar*, the rule in *Miranda* does not concern statements that have been formally compelled, but rather responds to judicial limitations on the ability to detect whether such compulsion has occurred in custodial interrogation.

Because the *Miranda* rule protects against the risk that a compelled statement will not be detected, its scope is narrower than the rules in *Hubbell* or *Kastigar*. The exclusion of statements from the government's case in chief directly responds to the danger to which *Miranda* is addressed. See *Dickerson*, 530 U.S. at 442. When the admission of potentially compelled statements is at issue, the "right protected by the *text* of the Fifth Amendment" is at stake. *Chavez*, 123 S. Ct. at 2004 (plurality opinion) (emphasis added); see also *id.* at 2006 (Souter, J., concurring in the judgment) ("[T]he text of the Fifth Amendment * * * focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony, and the core of the guarantee against compelled self-incrimination is the exclusion of any such evidence."); *Oregon* v. *Elstad*, 470 U.S. at 316-317 ("If the prosecution has actually violated the defendant's Fifth Amendment rights by introducing an inadmissible confession at trial, compelling the defendant to testify in rebuttal, the rule announced in *Harrison* v. *United States*, 392 U.S. 219 (1968), precludes use of that testimony on retrial.").

Where protection of the core guarantee of the Self-Incrimination Clause is not at stake, however, the calculus is distinctly different. The Court has recognized that, where an unwarned (but voluntary) confession is *not* offered in the case in chief, the cost of suppression—that "a guilty defendant [may] go free as a result" of the loss of reliable evidence, *Dickerson*, 530 U.S. at 444—is too high. Unwarned but voluntary statements may thus be used for impeachment, as in *Harris* v. *New York*, 401 U.S. 222 (1971), and

Oregon v. *Hass*, 420 U.S. 714 (1975). And in the few cases in which the Court has addressed arguments for suppressing evidence derived from an unwarned statement, as in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), which involved the admissibility of the trial testimony of a witness discovered as a result of the defendant's unwarned statement, or *Oregon* v. *Elstad*, *supra*, which involved the admissibility of a subsequent, warned statement made by the defendant after he had already made a first, unwarned statement, the Court has rejected such arguments.[1]

In all of those situations, there remains some "risk" that the defendant's statements were actually compelled, but that a court will fail to detect the compulsion. Nevertheless, that risk is addressed in the circumstances of *Harris*, *Hass*, *Tucker*, and *Elstad* by inquiring whether the statements were in fact voluntarily made. It is not addressed by extending *Miranda*'s presumption of compulsion beyond the case in chief. The same approach applies here as well. The admission of reliable physical evidence does not directly threaten the right protected by the Self-Incrimination Clause. See U.S. Br. 27-29, 35-37. The costs to the truth-seeking function of the criminal trial are too high to justify exclusion of reliable physical evidence, when the statements that led to the evidence cannot be shown to have been compelled.

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[1] Respondent argues (Br. 33-42) that *Elstad* and *Tucker* rested on additional points of analysis and can be distinguished factually, but that does not undermine their relevance to the issue in this case. In those cases, the Court refused to extend *Miranda* to require suppression of evidence outside of the government's case in chief, and the premise of the Court's reasoning was the *in*applicability of the fruits doctrine to unwarned statements. See pp. 10, 11-12, *infra*.

B. The *Miranda* Rule Protects A Right At Trial, And It Does Not Set Forth A Code Of Police Conduct

Respondent argues (Br. 10, 12) that "a violation of *Miranda*'s warning requirement is a violation of the Constitution" and that "*Miranda*'s warning requirement is * * * itself a right protected by the Constitution." See also, *e.g.*, Brennan Center Amicus Br. 12 (a failure to give *Miranda* warnings is "*misconduct* that the [*Miranda*] evidentiary rules are intended to deter"). Respondent concludes from that premise that evidence derived from an unwarned statement must be suppressed at trial to deter such pretrial police conduct, just as the Fourth Amendment's exclusionary rule has been shaped, under *Wong Sun* v. *United States*, 371 U.S. 471 (1963), to deter pretrial police conduct that violates the Fourth Amendment.

1. *Miranda* does provide guidance to the police about the preconditions for admitting statements taken in custodial interrogation. But it is ultimately a trial rule, not a constitutionally mandated regime of police conduct. "[A] simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." *Elstad*, 470 U.S. at 306 n.1. *Miranda* protects "a fundamental *trial* right." *Withrow* v. *Williams*, 507 U.S. 680, 691 (1993). As the Court explained in *Dickerson*, *Miranda* "held that certain warnings must be given before a suspect's statement made during custodial interrogation *could be admitted in evidence*." 530 U.S. at 431-432 (emphasis added). See *id.* at 435 (noting that the *Miranda* "guidelines established *that the admissibility in evidence* of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings") (emphasis added). Thus, "[t]he rule the Court established in *Miranda* is clear. *In order to be able to use statements obtained during custodial interrogation of the accused*, the State must warn the

accused prior to such questioning of his right to remain silent and of his right to have counsel, retained or appointed, present during interrogation." *Fare* v. *Michael C.*, 442 U.S. 707, 717 (1979) (emphasis added).[2]

The opinions in *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003), confirm that *Miranda* states a trial rule. *Chavez* involved the question whether a damages action could be brought under 42 U.S.C. 1983 for, *inter alia*, custodial interrogation without prior administration of *Miranda* warnings. The Court therefore confronted the question whether custodial interrogation without administration of *Miranda* warnings itself violates the Constitution. Six Justices concluded that it did not. The plurality opinion written by Justice Thomas explained that *Miranda* is a "prophylactic measure to prevent * * * the admission into evidence in [a] criminal case of confessions obtained through coercive custodial questioning." 123 S. Ct. at 2004. The plurality therefore concluded that the "failure to read *Miranda* warnings [in that case] did not violate [respondent's] constitutional rights." *Ibid.* Justice Kennedy, joined by Justice Stevens, "agree[d] with Justice Thomas that failure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues." *Id.* at 2013 (Kennedy, J., concurring in part and dissenting in part).

2. The government acknowledged in its opening brief (at 32) that *Miranda* and some of this Court's earlier cases do

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[2] See *Withrow* v. *Williams*, 507 U.S. at 690 ("Unless the prosecution can demonstrate the warnings and waiver as threshold matters, we held [in *Miranda*], it may not overcome an objection to the use at trial of statements obtained from the person in any ensuing custodial interrogation."); *New York* v. *Quarles*, 467 U.S. 649, 654 (1984) ("The *Miranda* Court, however, presumed that interrogation in certain custodial circumstances is inherently coercive and held that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights.").

contain language that could be read as suggesting rules for police conduct independent of the admission of evidence at trial, and respondent cites (Br. 46-47) additional cases along the same lines. Respondent, however, disregards the cases, from *Fare* v. *Michael C.* on, see pp. 6-7, *supra*, that have set forth the *Miranda* rule as one governing the admissibility of the defendant's confessions at trial. In any event, respondent's understanding of the cases he does cite is mistaken.

The issue in each of the cases respondent cites—indeed, the issue in each of this Court's *Miranda* cases before *Chavez*—was whether a statement was admissible at trial. Because that was the only issue before the Court in each case, it was natural for the Court to refer, for example, to "the warnings which must be given prior to in-custody interrogation," *Johnson* v. *New Jersey*, 384 U.S. 719, 726 (1966), without adding the qualification each time that the warnings must be given *if the resulting statement is to be admissible at the defendant's trial.* By the time of *Dickerson*, the understanding of the *Miranda* as a rule of exclusion at trial had become firm. And when the Court in *Chavez* ultimately confronted for the first time the question whether *Miranda* was a trial rule or a rule governing police conduct, six Justices concluded that unwarned custodial interrogation does not itself violate the Constitution.[3]

3. The contrast between this Court's *Miranda* cases and this Court's Fourth Amendment cases illustrates the distinction between constitutional rules whose violation occurs outside the trial and constitutional rules, such as *Miranda*, that are directed at the trial itself. A Fourth Amendment violation undoubtedly occurs outside of court and before trial. The question has therefore frequently arisen whether the need to deter such an out-of-court Fourth Amendment violation justifies excluding the fruit of that violation in a variety of contexts outside a criminal trial. See, *e.g.*, *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357 (1988) (parole revocation hearing); *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984) (civil deportation hearing); *United States* v. *Janis*, 428 U.S. 433 (1976) (civil tax proceedings); *United States* v. *Calandra*, 414 U.S. 338 (1974) (grand jury); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965) (forfeiture proceeding); *Giordenello* v. *United States*, 357 U.S. 480 (1958) (preliminary probable-cause hearing).

Under respondent's view, a *Miranda* violation occurs whenever the police question a suspect in custody without giving *Miranda* warnings. Accordingly, questions analogous to those arising under the Fourth Amendment—questions about whether the need to deter a *Miranda* "violation" requires exclusion of evidence at a wide variety of proceedings outside a criminal trial—would have to be answered with respect to *Miranda* as well. But because the *Miranda* rule protects a right at a criminal trial and violations of the *Miranda* rule could occur only at trial, those questions have by and large not arisen. When such extensions of *Miranda* have been proposed, this Court and other courts have firmly and uniformly rejected them on the basis that "[t]he Court has never held, and we decline to do so now, that the requirements of [*Miranda*] must be met to render pretrial statements admissible in other than criminal

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[3] Respondent argues that the government's reference in the question presented to "the warnings prescribed by *Miranda*," see Pet. i, somehow "implicitly acknowledges that *Miranda* includes a warning requirement, and that it is not just an evidentiary rule." Resp. Br. 45 n.14. It is undoubtedly true that *Miranda* "prescribed" certain warnings that must precede custodial interrogation if the resulting statements are to be admissible in the government's case in chief. That does not mean that *Miranda* established a rule governing police conduct for any other purpose.

cases." *Baxter* v. *Palmigiano*, 425 U.S. 308, 315 (1976).[4] The underlying reasoning is that, because *Miranda* addresses the dangers of undetected compelled self-incrimination at trial, it can have no logical application to proceedings other than a criminal trial. There is therefore no need to weigh deterrence concerns as in the Fourth Amendment context. That analysis too establishes the error of respondent's premise that *Miranda* sets forth a rule governing police conduct outside trial and that the rule should be extended to derivative evidence in order to achieve a greater level of deterrence.

Indeed, in *Oregon* v. *Elstad*, the Court recognized the "fundamental differences between the role of the Fourth Amendment exclusionary rule and the function of *Miranda* in guarding against the prosecutorial use of compelled statements as prohibited by the Fifth Amendment." 470 U.S. at 304. As the Court noted in *Dickerson*, *Elstad* "refus[ed] to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases" because it recognized that "unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth [Amendment]." *Dickerson*, 530 U.S. at 429.

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[4] See *United States* v. *Nieblas*, 115 F.3d 703, 705-706 ((9th Cir. 1997) (parole revocation); *United States* v. *Solano-Godines*, 120 F.3d 957, 960-961 (9th Cir. 1997) (deportation hearing), cert. denied, 522 U.S. 1061 (1998); *Bustos-Torres* v. *INS*, 898 F.2d 1053, 1056-1057 (5th Cir. 1990) (same); *United States* v. *MacKenzie*, 601 F.2d 221, 222 (5th Cir. 1979) (probation revocation), cert. denied, 444 U.S. 1018 (1980); *Cheng Chen* v. *INS*, 537 F.2d 566, 568 (1st Cir. 1976) (same); *DMV* v. *McLeod*, 801 P.2d 1390, 1392 (Nev. 1990) (driver's license revocation hearing); *Balsz* v. *Department of Pub. Safety*, 366 N.W.2d 492, 494 (S.D. 1985) (same); *Brewer* v. *DMV*, 595 P.2d 949, 951 (Wash. 1979) (same); *State* v. *Aldus*, 704 A.2d 386, 387 (Me. 1998) (civil proceeding).

C. The *Miranda* Rule Need Not Be Extended Now—After 37 Years—To Require The Exclusion Of Derivative Evidence

Although respondent presents (Br. 22-30) its fruits rule as indispensable to effectuating *Miranda*, the *Miranda* rule has achieved its purposes for nearly four decades, while this Court has declined to apply a fruits rule in the only cases presenting that question, and the overwhelming authority in the courts of appeals has expressly rejected extending the *Miranda* rule to suppress evidence derived from unwarned statements. The virtually complete absence of a derivative evidence rule during that time refutes respondent's argument that extending *Miranda* to incorporate such a rule is essential or appropriate now.

1. The *Miranda* rule has always been limited to the exclusion of unwarned statements themselves from the prosecution's case in chief. With two exceptions, all of this Court's *Miranda* cases arose when defendants challenged the admissibility of their allegedly unwarned statements at trial. In each of the two exceptions—*Michigan* v. *Tucker* and *Oregon* v. *Elstad*—the Court declined to extend *Miranda* to preclude the admission of evidence that was attacked as the "fruit" of an unwarned statement. Now, 37 years after *Miranda* announced its "core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief," *Dickerson*, 530 U.S. at 443-444, this Court should reject respondent's attempt to extend the *Miranda* rule beyond that core to suppress evidence derived from unwarned statements.

The Court's reasoning in *Elstad* makes clear that the *Miranda* rule is appropriately viewed as—and limited to—a protection against the risk of the introduction at trial of compelled statements. As the Court explained, "the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied

* * * by barring use of the unwarned statements in the case in chief." 470 U.S. at 318. The Court therefore noted that, although *Miranda* requires that unwarned statements be presumed compelled for purposes of the prosecution's case in chief, *Miranda* "does not require that the statements *and their fruits* be discarded as inherently tainted." *Id.* at 307 (emphasis added). Accordingly, the reasons for refusing to apply suppression apply "with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation" was "a witness," "*an article of evidence*," or "the accused's own voluntary testimony." *Id.* at 308 (emphasis added).[5]

2. The courts of appeals also declined to adopt a broad derivative evidence rule under *Miranda* before *Dickerson*, and the Tenth Circuit is the only court to change its view since *Dickerson* was decided. That consistent line of precedent refutes respondent's claim that a broad "fruits" rule is necessary to achieve the purposes of *Miranda*.

Before *Dickerson*, at least eight courts of appeals (including the Tenth Circuit) had concluded that *Miranda* did not require the suppression of physical evidence derived from an unwarned statement.[6] The First Circuit, while rejecting a broad rule suppressing derivative evidence in "ordinary" *Miranda* cases, had held in *United States* v. *Byram*, 145 F.3d 405, 409 (1998), that suppression could be warranted where "the events * * * are unusual." No court of appeals had agreed with respondent's position that suppression of the fruits of an unwarned statement was generally necessary or appropriate.[7]

After *Dickerson*, while the Tenth Circuit in this case did adopt a broad fruits rule, the Third Circuit joined the other courts of appeals in holding that *Miranda* did not warrant suppression of derivative evidence. See *United States* v. *DeSumma*, 272 F.3d 176, 180 (3d Cir. 2001). The Eighth Circuit also recently rejected the Tenth Circuit's reasoning and reaffirmed its pre-*Dickerson* holding that suppression of physical fruits is unwarranted. *United States* v. *Villalba-Al-*

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[5] Respondent's efforts to explain away those statements in *Elstad* (Br. 41-42) are unconvincing. For example, respondent relies (Br. 43) on the dissent's cautionary reading of the *Elstad* majority opinion as a basis for disagreeing with the majority's explicit mention of the lack of need to suppress "an article of evidence." 470 U.S. at 307. The dissent's analysis, however, cannot override the language and meaning of the Court's opinion. More generally, respondent's characterization (Br. 40, 41) of the Court's statements in *Elstad* as "opaque" and "passing reference[s]" does not alter the fact that one strand of the Court's reasoning in *Elstad* was that "*Miranda* sweeps more broadly than the Fifth Amendment itself," 470 U.S. at 306, and therefore does not mandate a broad rule requiring the suppression of the fruits of unwarned statements. 470 U.S. at 307-308.

[6] In addition to cases from the Second, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits cited in the government's opening brief (at 37-38 n.12), the Eighth Circuit had also held that *Miranda* did not warrant suppression of evidence derived from unwarned statements. See *United States* v. *Wiley*, 997 F.2d 378, 383 (8th Cir.), cert. denied, 510 U.S. 1011 (1993), overruled on other grounds by *United States* v. *Bieri*, 21 F.3d 819, 823 (8th Cir.), cert. denied, 513 U.S. 878 (1994).

[7] In *Patterson* v. *United States*, 485 U.S. 922 (1988), Justice White dissented from the denial of certiorari on "the question of the admissibility of physical evidence obtained as a result of an interrogation conducted contrary to the rules set forth in *Miranda*." *Id.* at 922. He argued that there was a conflict in the circuits on the issue, but he cited only three cases, all of them dating from well before this Court's decision in *Elstad*, for the proposition that derivative evidence should be suppressed. One was *United States* v. *Castellana*, 488 F.2d 65, 67 (5th Cir. 1974), but the panel's decision in that case had been vacated and overruled by the en banc Fifth Circuit. See *United States* v. *Castellana*, 500 F.2d 374 (1974). The en banc Fifth Circuit later held that "[a] violation of *Miranda* rules * * * necessitates only the exclusion of testimonial evidence from the prosecution's case in chief" and that "nontestimonial physical evidence * * * would not be excludable" under *Miranda*. *United States* v. *Bengivenga*, 845 F.2d 593, 600-601 (5th Cir.), cert. denied, 488 U.S. 924 (1988). The other two cases cited by Justice White were *Commonwealth* v. *White*, 371 N.E.2d 777 (Mass. 1977), aff'd by an equally divided Court, 439 U.S. 280 (1978), and *State* v. *Preston*, 411 A.2d 402, 407-408 (Me. 1980).

varado, No. 02-3101 (Oct. 10, 2003). The Fourth Circuit has similarly reaffirmed its pre-*Dickerson* rule. *United States* v. *Sterling*, 283 F.3d 216, 218-219 (2002). The First Circuit in *United States* v. *Faulkingham*, 295 F.3d 85, 93 (2002), petition for cert. pending, No. 02-7385 (filed Oct. 7, 2002), concluded that a suppression remedy depends on "weighing the reliability of the unwarned derivative evidence against the need for deterrence"—a balance that results in no suppression when, as in *Faulkingham* and this case, the *Miranda* violation was inadvertent and the derivative evidence is highly reliable physical evidence. Accordingly, eight courts of appeals at present have recognized that the *Miranda* rule does not require the suppression of derivative evidence, and the First Circuit would likely reach the same conclusion in a case like this one. The Tenth Circuit in this case has been the only court of appeals that has taken the opposite view.[8]

Chief Justice Burger commented in his opinion concurring in the judgment in *Rhode Island* v. *Innis*, 446 U.S. 291, 304 (1980), that the Court should not "overrule *Miranda*, disparage it, nor extend it at this late date." The experience of this Court and of the lower federal courts is that the *Miranda* rule has adequately served its purpose by preventing the introduction at trial of possibly compelled statements made during custodial interrogation. The expansion proposed by respondent would be a major shift in *Miranda* jurisprudence.

D. There Is No Adequate Deterrence-Based Justification for Extending The *Miranda* Rule

1. Respondent argues that excluding evidence derived from unwarned statements is necessary to ensure that police

[8] The Eleventh and D.C. Circuits have not directly spoken to the issue, but neither of them has excluded evidence that is the fruit of an unwarned statement.

officers do not intentionally refrain from giving *Miranda* warnings (Br. 22-25). He further contends that such exclusion is particularly important in cases involving physical evidence derived from unwarned statements (Br. 25-28), and that "even within the category of physical evidence fruit, there is a greater need for deterrence where the physical evidence constitutes the very essence of the offense" (Br. 27). As noted above, the *Miranda* rule protects the core Fifth Amendment right at trial and is not based on the need to prevent the police from committing violations of the Constitution outside the courtroom. But even if *Miranda* were in part justified by a deterrence rationale, respondent's arguments would be mistaken.

First, the *Miranda* rule itself, without the addition of a rule suppressing derivative evidence, provides a strong incentive to police to give *Miranda* warnings, as it has for the nearly four decades since *Miranda* was decided. At the time they take a suspect into custody, police officers ordinarily will not know whether any statements the suspect might make will prove necessary, merely useful, or entirely superfluous at an ultimate trial of the suspect. If they fail to give *Miranda* warnings, they take the risk that the opportunity for conviction will be lost because the suspect will make statements that would turn out to be necessary for conviction but that must nonetheless be suppressed under *Miranda*. See U.S. Br. 33.

Second, police officers who fail to give *Miranda* warnings take the additional risk that the suspect's statements will ultimately be found to be involuntary, thus requiring the suppression of the statements *and* derivative evidence. Because it will be a rare case in which *Miranda* warnings are administered and the suspect nonetheless is able to establish that his subsequent statements were involuntary, see, *e.g.*, *Dickerson*, 530 U.S. at 444, police officers have an incentive to administer *Miranda* warnings and thereby avoid the pos-

sible suppression of the confession and its fruits on involuntariness grounds.[9] See U.S. Br. 16-17.

Third, respondent's suggestion (Br. 25-28) that it is particularly important to suppress physical evidence derived from unwarned statements is directly at odds with the truthseeking function of criminal trials. "[C]oerced confessions are inherently untrustworthy," *Dickerson*, 530 U.S. at 433, and suppression of an accused's unwarned statements helps avoid the risk that such unreliable evidence will be introduced at trial. Physical evidence, however, is likely to be reliable regardless of whether it was obtained as the result of unwarned statements. Accordingly, suppression of such evidence imposes greater costs on the truthseeking function of the trial, and those higher costs refute respondent's contention that such evidence should be suppressed under *Miranda*. See U.S. Br. 35-36.

Finally, respondent's assertion that "there is a greater need for deterrence where the physical evidence constitutes the very essence of the offense" (Br. 27) suggests a regime in which the importance of the evidence in each case determines whether it must be suppressed. Such a regime would entangle the courts in difficult collateral litigation in each case to sort out just how central each piece of allegedly derivative evidence is to the government's case. Moreover, even in possession cases like this one, the government must connect the possessed item with the defendant. Although that connection will be obvious in some cases in which the forbidden item is found in a location closely connected to the

[9] Amicus Brennan Center argues (Br. 15-16) that cases in which law enforcement officers intentionally withhold *Miranda* warnings in the hope of acquiring derivative evidence reveal the need for additional deterrence in the form of a suppression remedy. See also *Missouri* v. *Siebert*, No. 02-1371 (to be argued Dec. 9, 2003). Not only are such cases comparatively rare, but some of Amicus's own citations reveal the danger that an unwarned statement will ultimately be found involuntary.

defendant, in other cases the defendant's statements will be a necessary part of the proof connecting the possessed item with the defendant. Police officers retain an incentive to give *Miranda* warnings, because they otherwise take the risk that they will be unable to make the necessary connection at trial between the physical evidence and the defendant. See U.S. Br. 34-35.

2. Amicus Brennan Center suggests (Br. 21) that derivative evidence should be suppressed when police officers have engaged in an "objectively unreasonable" failure to give *Miranda* warnings. An objectively unreasonable failure of a police officer to give *Miranda* warnings does not, however, mean that a suspect's ensuing statements are actually compelled. Nor does it have any bearing on the reliability of the evidence derived from the suspect's statements. Respondent's suggestion therefore is not tied to the central concerns of the Self-Incrimination Clause.

In addition, drawing a line between reasonable and unreasonable failures to give *Miranda* warnings would entangle the courts and the parties in unproductive and unnecessary litigation. Courts would be called on not merely to decide whether *Miranda* warnings were necessary and whether they were in fact given in a particular case. They would also have to grapple with the reasonableness of an officer's determination that the defendant was not in custody, see *Oregon* v. *Elstad*, 470 U.S. at 308, that he had not been interrogated, see *Rhode Island* v. *Innis*, 446 U.S. at 297-304, that he had not invoked his right to remain silent or to consult an attorney, see *Davis* v. *United States*, 512 U.S. 452 (1994), that the case fell within the public safety exception, see *New York* v. *Quarles*, 467 U.S. 649, 654 (1984), or that the warnings were in fact adequately given, see *Duckworth* v. *Eagan*, 492 U.S. 195 (1989). This Court should not require the lower courts to add that additional layer of litigation to determinations about the admissibility at a criminal trial of highly reli-

able physical evidence that has not been shown to be the product of compelled statements.

3. This case illustrates the high costs of extending the *Miranda* rule to require the suppression of physical evidence. After arresting respondent, the police officer in this case began to give him *Miranda* warnings. The officer got as far as informing respondent of his right to remain silent when respondent said that he knew his rights. Pet. App. 4a. The police officer then inquired again whether respondent knew his rights, and respondent answered in the affirmative. J.A. 40, 46. At that point, the officer told respondent that he was interested in respondent's guns. J.A. 41. Respondent stated that he might not be willing to say anything about his Glock pistol "because I don't want you to take it away from me." *Ibid.* The officer then told respondent that "[i]n order to be truthful about this whole matter * * * I need to know about the Glock." *Ibid.* He also said that "to get in front of [respondent's] domestic violence case," respondent "needed to be truthful regarding the location of his firearm." J.A. 48. Respondent then informed the officer where the Glock was located. J.A. 41, 93.[10]

[10] Amicus Brennan Center, but not respondent, suggests (Br. 5) that the officer's conduct could be "an egregious violation of *Miranda*," or at least that his statements were "a form of cajolery that *Miranda* specifically prohibits *prior* to waiver." Those assertions are without foundation. Of the three cases amicus cites, two involve police conduct that could be construed as threats made after the defendant invoked or appeared to invoke his desire for counsel under *Edwards* v. *Arizona*, 451 U.S. 477 (1981). See *Collazo* v. *Estelle*, 940 F.2d 411, 417 (9th Cir. 1991) (en banc) (officer's statements were a "textbook violation of *Edwards*"); *Commonwealth* v. *Gibbs*, 553 A.2d 409, 155 (Pa. 1989) (similar). The rules governing police conduct after the invocation of counsel under *Edwards* are not at issue in this case, because respondent never invoked his right to counsel. In the other case cited by amicus, *United States* v. *Pinto*, 671 F. Supp. 41 (D. Me. 1987), the district court found that the confession was involuntary, relying on the proposition that threats or promises by the police necessarily make a confession involuntary. *Id.* at 46-57. This Court has since rejected that proposition. See *Arizona* v. *Fulminante*, 499 U.S. 279, 285 (1991). More relevant than the cases cited by amicus are the numerous cases in which courts have held that police statements about leniency did not make a defendant's *Miranda* waiver invalid. See, *e.g.*, *Alston* v. *Redman*, 34 F.3d 1237, 1253-1254 (3d Cir. 1994) (police promise that plea bargain would be recommended to the prosecutor); *United States* v. *Bye*, 919 F.2d 6, 9-10 (2d Cir. 1990) (police statement about the benefits of early cooperation; citing cases); *United States* v. *Garot*, 801 F.2d 1241, 1245-1246 (10th Cir. 1986) (police promise to tell the prosecutor about defendant's cooperation); *United States* v. *Baldacchino*, 762 F.2d 170, 179 (1st Cir. 1985) (promise "to bring any cooperation on the part of the defendant to the prosecuting attorney's attention").

The government has conceded that the officer's failure to administer the remaining *Miranda* warnings was a deficiency under the *Miranda* rule that would result in the suppression of respondent's statement. Pet. App. 4a. But the deficiency in all likelihood had little or no effect on respondent's willingness to speak with the police. A defendant who is so anxious to talk with the police that he takes the initiative to interrupt the warnings and insist that he knows them already is likely to speak even if the officer had completed the *Miranda* warnings. Accordingly, the events that ensued in this case, including respondent's statements to the police, likely would have been the same had the full set of warnings been administered. The court of appeals nevertheless would have the technical failure to administer the *Miranda* warnings in this case result in suppression of the gun, thus likely precluding respondent's prosecution. The cost of precluding prosecution altogether is a high one, and that factor weighs heavily against respondent's proposed extension of the *Miranda* rule.

When this Court reaffirmed *Miranda* as a constitutional rule in *Dickerson*, it understood that the suppression of some unwarned, voluntary statements would result in guilty defendants going free. 530 U.S. at 444. But the Court was

willing to accept that result in part because "subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement." *Id.* at 443. The extension proposed by respondent would upset the balance struck in *Dickerson* and significantly magnify the adverse impact of *Miranda*.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
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IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

Petitioner,

— v. —

SAMUEL FRANCIS PATANE,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, AND THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation composed of more than 10,000 attorneys and 28,000 affiliate members in 50 states. The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 400,000 members. The California Attorneys for Criminal Justice (CACJ), a nonprofit corporation founded in 1972, has over 2,400 dues-paying members. *Amici* are dedicated to ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of American criminal justice systems, and preserving the principles of liberty and equality embodied in the Bill of Rights.

STATEMENT OF THE CASE

Respondent Patane was arrested for harassing and menacing Linda O'Donnell, a former girlfriend. On June 3, 2001, he was released on bond, subject to a temporary restraining order that forbade both in-person and telephonic contact with O'Donnell for 72 hours after his release. On June 6, Detective Benner, a member of a local drug interdiction unit, received a telephone call from a federal agent with the Bureau of Alcohol, Tobacco, and Firearms (ATF). The ATF agent informed Benner of a report that the respondent was a convicted felon and was in possession of a Glock .40 caliber pistol. Benner called O'Donnell, who told him that respondent had the pistol with him at all times.

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1. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

At the same time that Benner was calling O'Donnell, Officer Fox arrived at O'Donnell's home. Fox was responding to O'Donnell's claim that respondent had made telephonic contact in violation of the restraining order. O'Donnell told Fox that she was afraid for her safety and made additional allegations about respondent.

After Officer Fox informed Detective Benner that she was planning to arrest respondent for violating the restraining order, Fox and Benner went to respondent's home. Although respondent denied that he had called or otherwise contacted O'Donnell, Officer Fox informed him that he was under arrest and handcuffed him. At this point, Detective Benner approached respondent and began to recite the *Miranda* warnings. Upon being informed of the right to remain silent, respondent asserted that he knew his rights. Detective Benner neglected to complete the requisite admonitions. On appeal, the Government has conceded that this failure to complete the *Miranda* warnings violated the unequivocal mandate that all suspects subject to custodial interrogation be fully warned.

Detective Benner declared that he was interested in the guns respondent owned. Respondent stated that the police already had custody of his .357. When Benner replied that he was "more interested in the Glock," respondent said he was unsure whether to tell Benner about it. Nonetheless, Benner asserted that he needed to know about the weapon, prompting respondent to reply, "The Glock is in my bedroom on a shelf, on the wooden shelf." Upon seeking and receiving permission, Benner immediately entered the home, found the firearm where respondent had said it was located, and took possession of it.

Detective Benner apprised respondent that he would not be arrested for possession of the weapon because Benner wanted to conduct additional investigation. Officer Fox then

transported respondent to the police station, booking him for violation of the restraining order.

Respondent was subsequently indicted for possession of a firearm by a convicted felon, a violation of 18 U.S.C. § 922(g)(1). The district court granted respondent's motion to suppress the gun, ruling that it was the fruit of an arrest made without probable cause. On appeal by the Government, the United States Court of Appeals for the Tenth Circuit disagreed with the district court's probable cause determination, but concluded, nonetheless, that suppression of the firearm was appropriate. *United States v. Patane*, 304 F.3d 1013, 1018-1019 (10th Cir. 2002). The appellate court first recognized that the Government had "correctly concede[d]" that the failure to finish the prescribed warnings violated the dictates of *Miranda*. *Id.* at 1018. The court then concluded that the *Miranda* violation not only rendered the respondent's statements inadmissible, but also required suppression of the gun–"physical evidence that was the fruit of the *Miranda* violation in this case." *Id.* at 1019.

The United States petitioned this Court for a writ of *certiorari* to the United States Court of Appeals for the Tenth Circuit. On April 21, 2003, this Court granted the writ.

SUMMARY OF ARGUMENT

The Fifth Amendment freedom not to be "compelled to be a witness against" oneself prohibits the government from using both an accused's compelled testimony and nontestimonial derivative evidence to secure a conviction. This understanding of the privilege against compulsory self-incrimination, which has endured for well over a century, is reconcilable with the conclusion that the Fifth Amendment permits the government to rely on purely nontestimonial evidence compelled from an accused. The Constitution clearly

distinguishes between permissible incrimination by evidence with no connection to compelled testimony and impermissible incrimination by compelled testimony and evidence derived therefrom.

The Fifth Amendment grants a *right* against both the direct and indirect use of extorted testimony–a *constitutional entitlement to exclusion*. The right to exclude compelled testimony and its products is essential to further the purpose of the privilege–to protect against incrimination by thoughts forced from one's mind. A right encompassing both compelled statements and their products is also essential to preserve the "complex of values" underlying the privilege–our commitment to an accusatorial process, our principles of fair play, our respect for the human personality, an entitlement to the privacy of thoughts, and a concern with untrustworthy evidence that might lead to conviction of the innocent.

The *Miranda* doctrine furnishes "constitutionally required" protection against the "unacceptably great" risks of Fifth Amendment violations inherent in custodial interrogation. The exclusionary safeguard provided by *Miranda* is a critical part of that protection, barring evidence that harbors an intolerable likelihood of constitutionally forbidden compulsion. Although *Miranda*'s shelter may occasionally extend beyond that mandated by the privilege, its marginal overprotection is amply justified. The alternative approach, case-by-case adjudication, would be seriously underprotective, leaving fundamental rights unvindicated.

The exclusion of both statements and derivative evidence is essential to ensure that *Miranda* accomplishes its aims. Like the exclusion of statements, a derivative evidence prohibition deters *Miranda* violations and provides protection against untrustworthiness. Most important, it safeguards a "fundamental trial right," shielding against a constitutionally

cognizable likelihood of compulsory self-incrimination and against serious damage to enduring constitutional values.

Because *Miranda*'s shelter may extend beyond the core protection mandated by the Fifth Amendment, interest balancing is permissible in defining the required scope of *Miranda* exclusion. Limitations on the breadth of exclusion are justified *only* when the ordinarily unacceptable risks of compulsory self-incrimination are diminished or the usual costs of exclusion are heightened. In this case, an inexcusable violation of the clear mandate that *all* suspects be fully warned yielded statements. Official exploitation of those statements led directly and immediately to the weapon at issue. Nothing intervened to weaken the connection between the statements and the discovery of the weapon, and the costs of exclusion were ordinary–the loss of probative evidence of guilt.

When the causal connection is strong, as in this case, derivative evidence poses threats to Fifth Amendment rights identical to those posed by statements obtained in violation of *Miranda*. Consequently, unless the price of suppression is atypically high, the balance of interests heavily favors a derivative evidence principle–a rebuttable presumption of exclusion. Derivative evidence should be admissible *only* when the government shows "attenuation" of the connection between the statements and the evidence.

The view that derivative evidence is *never* subject to exclusion reflects a skewed balance that is irreconcilable with the Court's consistent approach to delineating *Miranda*'s reach. *Miranda*, *Dickerson*, and the exclusionary rulings in *Harris*, *Tucker*, and *Elstad* confirm that the Court has avoided extreme answers to *Miranda* questions, and has consistently struck balances that fairly accommodate both constitutional rights and law enforcement interests. The proposed approach–a rebuttable presumption of derivative evidence

exclusion–is consonant with this pattern, does not result in exclusion as broad as that mandated by the Fifth Amendment itself, and finds additional support from the Court's recent conclusion that *in-court* protection against conviction based on compelled testimony is the essence of the Fifth Amendment privilege. The excessive tolerance for derivative evidence advocated by the government would evince disrespect for an invaluable constitutional liberty, undermine the vital roles *Miranda*'s constitutionally required safeguards play in preserving that liberty, and send an unfortunate message to the people and to law enforcement.

ARGUMENT

I. THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION ERECTS A BAR TO INCULPATORY, NONTESTIMONIAL EVIDENCE THAT IS THE PRODUCT OF COMPELLED TESTIMONIAL ADMISSIONS

The question in this case is whether nontestimonial evidence derived from statements secured in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), is subject to exclusion. Because *Miranda* "is of constitutional origin," *Dickerson v. United States*, 530 U.S. 428, 439 n.3 (2000), rooted firmly in the Fifth Amendment, an examination of that guarantee's treatment of derivative evidence is indispensable. The Fifth Amendment's intolerance of convictions based on the products of testimonial compulsion provides vital support for a presumptive rule of suppression in *Miranda* contexts.

A. The Court's Precedents Uniformly Recognize A Prohibition On Incrimination By Any Evidence Derived From Compelled Testimony

Starting over a century ago, *see Counselman v. Hitchcock*, 142 U.S. 547 (1892), and consistently since then, the Court has interpreted the privilege against compulsory self-incrimination to provide protection against the government's use of compelled testimonial admissions *and* any evidence, whether testimonial or not, derived from compelled testimony. *See Kastigar v. United States*, 406 U.S. 441, 459 (1972) (protection against "use and derivative use . . . is the degree of protection that the Constitution requires"); *Doe v. United States*, 487 U.S. 201, 208 n.6 (1988) (Fifth Amendment includes a "prohibition of derivative use" of compelled testimony). The cases endorsing this principle have all been concerned with the extent of "immunity" constitutionally required when formal, judicial compulsion is used to extract a statement. The governing principle, however, is broad enough to forbid the use of nontestimonial evidence derived from testimonial admissions produced by informal, extra-judicial compulsion. *See Kastigar v. United States*, 406 U.S. at 461-62 (confessions coerced by the authorities and "evidence derived" therefrom are "inadmissible" under the Fifth Amendment).[2]

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2. *See also Chavez v. Martinez*, 123 S.Ct. 1994, 2002 (2003) (Opinion of Thomas, J.)(victims of "coercive police interrogations have an *automatic* protection" against the use of derivative evidence); *Dickerson v. United States*, 530 U.S. at 452 (Scalia, J., dissenting)(if a statement is "obtained in violation of the Fifth Amendment, the statement and its fruits [are] excluded"); *Oregon v. Elstad*, 470 U.S. 298, 351 (1985)(Brennan, J., dissenting)(the introduction of physical evidence and other "fruits" of a compelled statement "at trial would violate the Self-Incrimination Clause just as surely as if the original confession itself were introduced").

The bar to nontestimonial derivative evidence is entirely consistent with the conclusion that the Fifth Amendment permits the government to introduce nontestimonial evidence compelled from an accused. *See Schmerber v. California*, 384 U.S. 757 (1966); *see also Dionisio v. United States*, 410 U.S. 1 (1973). The Constitution allows convictions based on "real or physical" evidence forced from the defendant. *See Pennsylvania v.*

(continued...)

This constitutional ban on compelled testimony and its evidentiary products is no mere "exclusionary rule" and "poisonous fruits" doctrine. It is the substance, the very essence of the freedom not to be "compelled to be a witness" against oneself. The Fifth Amendment privilege is violated *not* by out-of-court compulsion itself, but *only* by the *use* of the products of that compulsion to incriminate. *See Chavez v. Martinez*, 123 S. Ct. at 2001 (Opinion of Thomas, J.); *id.* at 2006 (Souter, J., concurring in the judgment); *id.* at 2008 (Scalia, J., concurring in part in the judgment). Thus, the exclusion of extorted testimony and evidence derived therefrom is an integral part of the fundamental liberty promised by the Self-Incrimination Clause.[3]

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2. (...continued)
Muniz, 496 U.S. 582, 590 (1990). It does not permit the authorities to rely on or exploit "testimony"–"knowledge of facts" or "thoughts and beliefs"–forced from an accused's mind. *See Doe v. United States*, 487 U.S. 201, 210-212 (1988). The bold constitutional line is *not* between testimonial and nontestimonial evidence. Rather, it is situated between admissible nontestimonial evidence *with no connection to* compelled thoughts and inadmissible nontestimonial evidence *derived from* compelled testimonial revelations. *See id.*, 487 U.S. at 211 n. 10 (the distinction is "between the suspect's being compelled himself to serve as evidence and the suspect's *being compelled to disclose or communicate information or facts that might* serve as or *lead to* incriminating evidence")(emphasis added). The determinative question is whether "'compelled testimony'" is a "'link in the chain of evidence.'" *Id.* at 208 n.6.

3. *See Kastigar v. United States*, 406 U.S. at 453 (Fifth Amendment privilege protects against "evidence derived directly and indirectly" from compelled testimony because it "prohibits the prosecutorial authorities from using . . . compelled testimony in *any* respect"); *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 79 (1964) ("to implement" the privilege, the government "must be prohibited from making . . . use of compelled testimony and its fruits"); *see also New York v. Quarles*, 467 U.S. 649, 658 n.7 (1984)(exclusion of compelled statements is a "constitutional imperative").

B. The Values Underlying The Fifth Amendment Privilege Provide Compelling Support For The Prohibition On Nontestimonial Derivative Evidence

The constitutional barrier to all derivative evidence promotes the objectives of and preserves the values that underlie the Fifth Amendment privilege. A contrary view would undermine those objectives and jeopardize those values. The Fifth Amendment "assures that a citizen [will] not [be] compelled to incriminate himself by his own testimony." *Kastigar v. United States*, 406 U.S. at 461. The guarantee's "sole concern is to afford protection against being 'forced to give testimony leading to the infliction'" of punishment. *Id.* at 453. Consequently, shelter against "evidence derived directly and indirectly" from compelled testimony, *id.*, is necessary to combat "the dangers against which the privilege protects." *Id.* at 449.

According to the Fifth Amendment, the government must "establish guilt by evidence independently and freely secured," and "may not by coercion prove a charge against an accused out of his own mouth." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The privilege embodies "the recognition that the American system of criminal prosecution is accusatorial, not inquisitorial," *id.* at 7, and "reflects a complex of our fundamental values and aspirations." *Kastigar v. United States*, 406 U.S. at 444. Among those values and aspirations is "*our sense of fair play* which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load'; *our respect for the inviolability of the human personality* and of the *right* of each individual '*to a private enclave* where he may lead a private life'; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection

to the innocent.'" *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964)(emphasis added; citations omitted).

The use of nontestimonial evidence derived from compelled admissions imperils these values. Derivative evidence is no more "independently and freely secured" than the admissions themselves. When the prosecution uses it to convict, it surely has "by coercion prove[n] a charge against an accused out of his own mouth." The result is an "inquisitorial" process in which extorted contents of an accused's mind have "led to the infliction of punishment." Whether compelled thoughts are used directly or exploited to acquire the evidence used to incriminate, the "sense of fair play," the "respect for the inviolability of the human personality," and the entitlement to a "private enclave" preserved in the Fifth Amendment are offended.[4] The trial afforded is not the one guaranteed by the

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4. As with many Bill of Rights liberties, a concern with risks of unreliability is *among* the "complex of values" underlying the privilege. *See Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. at 55 (citing "distrust of self-deprecatory statements" and a "realization that the privilege" often protects "the innocent"). Physical evidence derived from compelled testimony is not *always* unqualifiedly reliable. For example, under official pressure, an individual might lead officers to contraband. Although the contraband belongs to others, the surrounding circumstances could erroneously suggest that the individual who provided the lead was guilty of possession. An unjustified conviction could result.

More important, even if derivative evidence is ordinarily more trustworthy than "self-deprecatory statements," there is ample reason for constitutional concern. For good reason, unreliability is not a necessary predicate for Fifth Amendment exclusion. *See Michigan v. Tucker*, 417 U.S. 433, 448 n.23 (1974)(coerced statements are not rendered admissible by their truthfulness); *see also Spano v. New York*, 360 U.S. 315, 320 (1959)("[t]he abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness"); Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled*
(continued...)

Framers.

In sum, the core Fifth Amendment objectives necessitate protection against incrimination by derivative, nontestimonial evidence. Exclusion is an indispensable element of the right not to be compelled to be a witness against oneself.

II. *MIRANDA*'S FIFTH AMENDMENT FOUNDATIONS AND THE CONSTITUTIONAL JUSTIFICATIONS FOR EXCLUDING EVIDENCE UNDER THE *MIRANDA* DOCTRINE DICTATE A PRESUMPTION OF EXCLUSION FOR DERIVATIVE EVIDENCE

Because *Miranda*'s constitutionally-rooted protections may extend, in a particular case, beyond the mandates of the Fifth Amendment, that provision's bar to derivative evidence does not conclusively answer the question before the Court: whether a presumption of exclusion governs evidence derived from *Miranda* violations.[5] Nonetheless, the privilege's

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4. (...continued)
Testimony, 93 Mich. L. Rev. 929, 936-40 (1995) (concern with unreliability is not the primary basis for exclusion of coerced confessions). Whether derivative evidence is trustworthy or not, its use violates accusatorial system principles of fair play and breaches the constitutional compact between state and citizen. It has never been suggested that constitutional shelter is limited to instances in which *every* Fifth Amendment value is at risk. If that were the case, then trustworthy extorted *statements* would also be admissible.

5. Whether *Miranda* doctrine includes a derivative evidence principle is a genuinely unsettled question. In *Michigan v. Tucker*, 417 U.S. at 447, the Court refused to "resolve the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded," choosing to "place [its] holding on a narrower ground." *See Patterson v. United States*, 485 U.S. 922 (1988) (White, J., dissenting from
(continued...)

hostility to derivative evidence, coupled with other critical factors, militates strongly in favor of a presumption of exclusion under *Miranda*.

A. *Miranda* Provides "Constitutionally Required" Protection Against "Unacceptably Great" Risks of Fifth Amendment Violations

In *Dickerson v. United States*, 530 U.S. 428 (2000), the Court explained how the Fifth Amendment premises that have always been the foundation of *Miranda* are reconcilable with the decisions denying that *Miranda*'s protections are constitutional rights and characterizing *Miranda*'s dictates as prophylactic standards or procedural safeguards. *See Dickerson v. United States*, 530 U.S. at 437-41. The *Miranda* requirements–warnings, waiver, and the additional safeguards triggered by assertion of the entitlements to silence or counsel–are not constitutional rights that belong to suspects subjected to custodial interrogation. *See Michigan v. Tucker*, 417 U.S. 433, 444 (1974). Nor is the exclusion of evidence secured in violation of these requirements a Fifth Amendment right. *See New York v. Quarles*, 467 U.S. 649, 658 n.7 (1984). Instead, *Miranda*'s safeguards are "constitutional requirement[s] adopted to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause." *Chavez v. Martinez*, 123 S.Ct. 1994, 2013 (2003)(Kennedy, J., concurring in part and dissenting in part). "[T]he protections

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5. (...continued)
denial of certiorari). Although *dicta* in *Oregon v. Elstad*, 470 U.S. 298 (1985), intimated one possible answer to the broader question, the *Elstad* holding focused narrowly on second confessions following compliance with *Miranda*. *See Patterson v. United States*, 485 U.S. at 923. In the only case presenting a clear opportunity to provide closure, an evenly divided Court failed to resolve the issue. *See Massachusetts v. White*, 439 U.S. 280 (1978). Thus, an answer must be found not in precedent, but in the constitutional principles that undergird and justify *Miranda*.

announced in *Miranda*"–both the constraints on custodial interrogation and the courtroom bar to statements–are "constitutionally required," *Dickerson v. United States*, 530 U.S. at 438, and "'necessary to assure compliance with the dictates of the . . . Constitution." *Id.* at 439 (quoting *Harris v. Rivera*, 454 U.S. 339, 344-345 (1981). *Miranda* prescribes essential "constitutional standards for protection of the privilege" against compulsory self-incrimination and furnishes necessary shelter against "unacceptably great" risks that Fifth Amendment rights will otherwise be lost. *Id.* at 440, 442.

The *Miranda* safeguards diminish the constitutionally unacceptable risks by dispelling the compulsion *inherent* in custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 458, 467 (1966). The *Miranda* exclusionary doctrine provides even more critical protection against those risks. The failure to honor *Miranda*'s dictates gives rise to a constitutionally cognizable "likelihood" that any statements made have been compelled.[6] *Miranda*-based exclusion erects an essential barrier at the courtroom door, screening out statements that pose "unacceptably great" risks of violating the fundamental right not to be compelled to be a witness against oneself.[7]

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6. *See New York v. Quarles*, 467 U.S. 649, 656 (1984)(*Miranda* requirements counter the "likelihood" of victimization by "constitutionally impermissible practices"). By reducing the "likelihood" of official compulsion, *Miranda*'s constraints on custodial interrogation prevent the generation of evidence that would jeopardize Fifth Amendment rights if introduced at trial. *See Minnick v. Mississippi*, 498 U.S. 146, 155 (1990) (*Miranda* provides "particular and systemic assurances that coercive pressures of custody are not the inducing cause" of statements).

7. *See Chavez v. Martinez*, 123 S.Ct. at 2004 (Opinion of Thomas, J.)(*Miranda* exclusion is "a prophylactic measure to prevent violations of the . . . Self-Incrimination Clause"); *id.* at 2007 (Souter, J., concurring in the judgment)(*Miranda* reflects a judgment that the "core" Fifth Amendment "guarantee . . . would be at . . . risk" without the protections it affords).

In some cases, *Miranda*'s shelter may extend beyond the precise commands of the Fifth Amendment. Despite the inherent "likelihood" of official pressure to speak, a particular custodial interrogation might not generate actual compulsion. The *Miranda* scheme still applies, instructing officers to abide by the safeguards needed to combat the pressures that are ordinarily present. Moreover, *Miranda*'s exclusionary rule mandates the suppression of statements made without those safeguards. If officers have failed to follow the *Miranda* rules, but there is no additional proof of compulsion to speak, a confession that "'*might* be voluntary'" will be barred from trial. *See Minnick v. Mississippi*, 498 U.S. at 151 (quoting *Fare v. Michael C.*, 442 U.S. 707, 718 (1979)(emphasis added)); *see also Oregon v. Elstad*, 470 U.S. at 307.

In a perfect world, judges could accurately and efficiently ascertain whether each suspect subjected to custodial interrogation was compelled to speak. The marginal overprotection of core constitutional rights that results from *Miranda*'s bright lines would not be necessary to preserve the Fifth Amendment privilege. The Court's long experience with police practices and resulting confessions–both before and since *Miranda*–has provided convincing evidence that such perfection is simply unattainable. The choice, therefore, is between case-by-case adjudication that fails to identify compelled statements and uniform, general standards that inaccurately classify some voluntary statements. The case-by-case approach would seriously *underprotect* Fifth Amendment rights, permitting an intolerable amount of unconstitutional compulsory self-incrimination–*i.e.*, it would leave constitutional rights unvindicated far too often. While the *Miranda* approach may overprotect those fundamental rights, occasionally preventing the government from proving its case with acceptable evidence, it reflects a firmly-grounded judgment that the severe constitutional damage that would otherwise result offsets the limited number of instances in

which suppression blocks legitimate convictions.[8] For these reasons, the *Miranda* rules and exclusionary doctrine, or fully effective equivalents, qualify as "constitutional requirement[s]" essential "to implement the Self-Incrimination Clause." *Chavez v. Martinez*, 123 S.Ct. at 2013 (Kennedy, J., concurring in part and dissenting in part).

B. The Exclusion Of Both Statements Secured In Violation of *Miranda* And Evidence Derived From Those Statements Safeguards Fundamental Fifth Amendment Values

The exclusion of statements obtained in violation of *Miranda* rests, in part, on deterrence and trustworthiness premises. *See Oregon v. Elstad*, 470 U.S. at 308; *Michigan v. Tucker*, 417 U.S. at 446-49.[9] In *Withrow v. Williams*, 507 U.S. 680 (1993), however, the Court made it clear that these "twin rationales," *Oregon v. Elstad*, 470 U.S. at 308, are *not the sole justifications* for *Miranda*'s exclusionary doctrine. By forbidding statements that entail "unacceptably great" risks of

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8. The number of cases in which *Miranda* exclusion overprotects by barring probative, voluntary statements is relatively small for at least two reasons. First, the inherent risk of compulsion due to custodial interrogation is high. When compulsion is present, exclusion is not overprotective. In addition, it is easy to comply with *Miranda*'s safeguards. *See Withrow v. Williams*, 507 U.S. at 695 (observing that there is "little reason to believe that the police today are unable . . . to satisfy *Miranda*'s requirements"). Officers can reduce the risk of having confessions excluded by complying with the requirements of *Miranda*. Many warned suspects choose to waive the *Miranda* protections and make admissible statements.

9. By deterring unregulated custodial interrogation, suppression diminishes the risks that compelled testimonial evidence will be generated. If such evidence never comes into existence, it cannot incriminate an accused. Moreover, the exclusion of untrustworthy admissions prevents unreliable convictions–one of the Fifth Amendment's objectives. *See Withrow v. Williams*, 507 U.S. 680, 692 (1993).

compulsion, "*Miranda* safeguards 'a fundamental *trial* right.' *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (emphasis added)." *Withrow v. Williams*, 507 U.S. at 691. Thus, exclusion under *Miranda* is *much more* than a mere deterrent or shield against untrustworthiness. The *Miranda* bar furnishes critical protection for core Fifth Amendment values. By preventing actual deprivations of constitutional rights, exclusion promotes our preference for an accusatorial justice system, protects against inhumane treatment, enforces our dedication to principles of fair play that insist on balance between the state and individuals and require the government to carry its burden of proof without relying on thoughts forced from the mind of the accused, ensures respect for human dignity, and safeguards the entitlement to preserve the privacy of thoughts. *See Withrow v. Williams*, 507 U.S. at 692.[10]

A prohibition on derivative evidence is equally necessary to safeguard the Fifth Amendment "trial right" and prevent unwarranted erosion of the values underlying the privilege.[11] If statements are excluded because unrestrained custodial interrogation engenders "unacceptably great" risks of compulsion and because conviction based on those statements endangers the "complex of values" underlying the privilege, then evidence that is the fruit of those identical risks poses unquestionable, indeed identical, constitutional perils.

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10. *See* discussion *supra*, section I.B. Because the out-of-court conduct deterred by *Miranda* exclusion does not actually violate the Fifth Amendment, in one sense, the *Miranda* exclusionary rule accomplishes *less* than the Fourth Amendment rule. *See Oregon v. Elstad*, 470 U.S. at 305-06. On the other hand, because *Miranda* exclusion *actually prevents the violation of a fundamental right at trial*, it accomplishes considerably *more* in the courtroom than the nonremedial, purely deterrent Fourth Amendment rule. *See Withrow v. Williams*, 507 U.S. at 691-92.

11. The exclusion of derivative evidence also deters *Miranda* violations and can guard against untrustworthiness, as well.

Evidence derived from disclosures that are likely to have been forced from an accused's mind can render a trial process inquisitorial and violate revered principles of fair play, decent treatment, and privacy. The rationales for *Miranda* exclusion recognized in *Withrow* surely extend to derivative evidence.

C. The Balance of Interests Tips Decidedly In Favor Of A *Miranda* Derivative Evidence Principle That Justifies Exclusion In This Case

If *Miranda*-based exclusion were coextensive with the constitutional prohibition of compulsory self-incrimination, there would be no occasion to balance interests. The categorical Fifth Amendment barrier to compelled testimony and its products would govern. Evidence secured in violation of *Miranda*, however, is not barred because admission is *certain* to violate the Fifth Amendment. Exclusion is constitutionally required because the *risks* of a Fifth Amendment violation are "unacceptably great." *Dickerson v. United States*, 530 U.S. at 442. A prohibition on trial use "reduce[s]" those risks and "implement[s]" the core–indeed, the *sole*–protection furnished by the privilege. *See Chavez v. Martinez*, 123 S.Ct. at 2013 (Kennedy, J., concurring in part and dissenting in part). Although the trial shield that *Miranda* affords is not a personal "right," it is nonetheless "'necessary to ensure compliance with the . . . Constitution.'" *Dickerson v. United States*, 530 U.S. at 439.

Because the *Miranda* exclusionary doctrine is a constitutionally required "extension" of the core Fifth Amendment guarantee, *see Chavez v. Martinez*, 123 S.Ct. at 2007 (Souter, J., concurring in the judgment), the Court has balanced interests to determine the scope of suppression that is necessary. *See, e.g., Withrow v. Williams*, 507 U.S. 680 (1993); *Oregon v. Elstad*, 470 U.S. 298 (1985); *Harris v. New York*, 401 U.S. 222 (1971). Limitations on the breadth of

exclusion are justified only when the circumstances demonstrate either diminished threats to Fifth Amendment values or elevated costs of exclusion. The relevant balance of interests tips decidedly in favor of a presumptive ban on the products of *Miranda* violations. Derivative evidence should be admissible only if the government establishes either that the connection between the presumptively compelled admissions and the evidence acquired as a result is demonstrably weakened or that the costs of exclusion are especially weighty.

The precedents concerned with *Miranda* exclusion strongly support this conclusion. In *Harris v. New York*, 401 U.S. 222 (1971), the Court held that statements secured in violation of *Miranda* could be used to impeach an accused who testifies. In the Court's view, the balance of interests favored admissibility for several reasons. First, the statements could not be used to prove guilt, but only to cast doubt on the credibility of a testifying defendant. *Id.* at 223-25. Thus, the potential for compelled self-*incrimination* was lower and the corresponding peril to Fifth Amendment values at trial was less severe. Moreover, the Court thought it unlikely that impeachment use would create a substantial incentive to ignore *Miranda*. *Id.* at 225. Finally, the costs of having to allow perjury without refutation were thought to be intolerably high. *Id.* at 225-26. Limited incrimination, reduced deterrent value, and elevated costs significantly altered the usual balance.

In *Michigan v. Tucker*, 417 U.S. 433 (1974), two factors favored the admission of derivative evidence secured in violation of *Miranda*. First, because the interrogation in *Tucker* took place *before* the *Miranda* decision, the officers' good faith was unquestionable. They could hardly have anticipated the yet-to-be-announced constitutional safeguards. Consequently, there was virtually no deterrent justification for

excluding the evidence.[12] In addition, the evidence at issue was third-party testimony discovered from leads provided by the accused's statements. The time and the witness's free will that intervened between the *Miranda* violation and the acquisition of the testimony attenuated the link between the presumptively compelled admissions and the evidence, further weakening any deterrent basis for exclusion *and* lowering the risks that Fifth Amendment rights would be violated at trial. The balance in *Tucker* was markedly altered by factors that all but eliminated deterrence as a justification *and* diminished the perils to constitutional values at trial.

In *Oregon v. Elstad*, 470 U.S. 298 (1985), a suspect confessed without *Miranda* warnings. The disputed evidence was a second confession given after officers issued warnings and obtained a voluntary waiver. The compliance with *Miranda* and the suspect's voluntary choice to make a second statement led the majority to conclude that any connection between the suspect's first and second confessions was "speculative and attenuated at best." *Id.* at 313-14. In other words, the causal link between the presumptively compelled statement and the statement that followed complete warnings and a voluntary waiver was seen as inherently weak. As a result, there was minimal risk of harm to Fifth Amendment values when the second statement was introduced. For the same reason, the deterrent effect of suppression was thought to

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12. Because an officer's "good faith" neither decreases the risks of compelled self-incrimination at trial nor increases the cost of excluding a particular item of evidence, it does not bear on whether exclusion is necessary to serve the exclusionary rule objective recognized by the *Withrow* Court–to provide essential protection for the fundamental Fifth Amendment trial right. The officers' good faith was relevant in *Tucker* only insofar as it undermined the *deterrent* rationale for *Miranda*-based exclusion.

be inconsequential. *See id.* at 308-09.[13] Thus, the balance of interests in *Elstad* was significantly altered by the intervening voluntary cooperation of the suspect after officers complied with *Miranda*.[14]

In the instant case, Detective Benner failed to issue warnings in clear violation of the never-questioned command that admonitions be given to every suspect subjected to custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 468-69 (1966).[15] A suspect's assertion that he knows the warnings has never excused the failure to warn, and it would be objectively unreasonable to believe that such an exception exists. In addition, the gun sought to be introduced was found immediately in precisely the location revealed by the

13. The *Elstad* majority dismissed the "cat-out-of-the-bag" presumption–the notion that a defendant who has once confessed will again confess *because* he is aware that he has little left to lose. *See Oregon v. Elstad*, 470 U.S. at 312-14. In this case, the causal connection between the statement and the weapon is clear and does *not* depend on "cat-out-of-the-bag" reasoning.

14. Although *New York v. Quarles*, 467 U.S. 649 (1984), is not an "exclusionary rule" opinion, but, instead, addresses the character of the protections provided by *Miranda*, the decision to create a "public safety" exception to the *Miranda* warnings requirement was rooted in reasoning quite similar to that in *Harris*, *Tucker*, and *Elstad*. In *Quarles*, the Court concluded that the ordinary balance was substantially altered, indeed tipped, by the critical interest in preventing serious threats to the public. The cost side of the balance was markedly heavier than in the ordinary case.

15. The rigid requirement that warnings be recited to all suspects–even those who assert awareness–serves three vital functions. It provides clear guidance to officers, plays an important role in dispelling the compulsion inherent in custodial interrogation, and saves judicial resources.

respondent.[16] No significant time period elapsed, no compliance with *Miranda* and free-willed choice intervened, and no other circumstances lowered the risks that the weapon was the product of compelled testimonial self-incrimination. Furthermore, the cost of excluding the gun was not extraordinary, but was comparable to the cost of excluding the defendant's statements. There was no need to tolerate courtroom lies, no compelling public safety concern at stake, no cost other than the one ordinarily imposed by *Miranda* exclusion–the loss of evidence of illegal firearm possession.

When the connection between statements and derivative evidence is so close, the likelihood of compulsory self-incrimination and infidelity to Fifth Amendment values, "unacceptably great" with respect to the statements, is unmitigated. Because of the proximity of the statements to the derivative evidence, the constitutional interests threatened by use of the statements are equally endangered by introduction of the fruits. To exclude incriminating admissions, but not evidence derived directly from those admissions, would be to authorize constitutional sleights-of-hand and to ignore intolerable risks of conviction based on the extorted contents of an accused's mind. An exclusionary doctrine confined to statements would provide woefully insufficient shelter for the "fundamental trial right" that *Miranda* safeguards.

The balance of interests heavily favors a derivative evidence principle–a presumption that evidence yielded by *Miranda* violations is subject to exclusion. In an ordinary case such as this, with no special counterweights to the revered values furthered by exclusion, derivative evidence should be admissible *only* when the government establishes that the

16. "The questioning led Patane to admit that he possessed a gun in his bedroom, which admission in turn led immediately to the seizure of the gun." *United States v. Patane*, 304 F.3d 1013, 1018 (10th Cir. 2002).

connection between a statement and derivative evidence has been weakened in ways that lessen the "unacceptable" Fifth Amendment risks spawned by unregulated custodial interrogation. Because no attenuation showing was made in this case, exclusion of the gun was clearly proper.[17]

III. A DERIVATIVE EVIDENCE PRINCIPLE COMPORTS WITH THE COURT'S APPROACH TO DEFINING *MIRANDA*'S SCOPE AND WILL PROMOTE RESPECT FOR THE FIFTH AMENDMENT PRIVILEGE AND FOR THE ROLES *MIRANDA* PLAYS IN SAFEGUARDING A FUNDAMENTAL LIBERTY

17. The Fourth Amendment exclusionary rule is primarily a deterrent to *future* violations. Because the "character" of a particular transgression (*e.g.*, whether it is purposeful and flagrant or merely technical) bears upon the need for or desirability of a deterrent sanction, that factor influences Fourth Amendment "attenuation" determinations. *See Brown v. Illinois*, 422 U.S. 590, 604 (1975). *Miranda* exclusion, however, serves not only to deter future misconduct, but also to prevent *present* Fifth Amendment violations. *See Withrow v. Williams*, 507 U.S. at 691. Because the "character" of a *Miranda* violation does not diminish the risks of compulsory self-incrimination at trial or increase the costs of excluding derivative evidence, it cannot alter the balance of interests that should dictate the scope of *Miranda* exclusion. Consequently, that factor should be deemed irrelevant to "attenuation" analysis under *Miranda*. Only intervening circumstances that significantly weaken the causal connection–*e.g.*, substantial periods of time, an accused's or a third-party's free will, or other noteworthy events–should be taken into account in deciding whether the presumption of exclusion has been rebutted.

The reasoning and holding in *Michigan v. Tucker* are not to the contrary. The good faith nature of the officers' failure to give *Miranda* warnings was relevant *only* insofar as it bore on whether exclusion was needed *to deter* future failures. More important, the officers' lack of fault was not the *only* factor that supported admission of the testimony of the witness found in violation of *Miranda*. The causal chain in *Tucker* was weakened by the intervention of time and free will. Those factors diminished the risk of compelled self-incrimination at trial.

The government's extreme position–that exclusion *never* extends beyond statements obtained in violation of *Miranda*–advocates a meat-axe-like approach to interpretation of a vital safeguard. That approach is wholly out of line with the Court's balanced resolutions of questions involving the reach of *Miranda*, betrays insufficient reverence for a fundamental Fifth Amendment liberty, and would undermine the important roles *Miranda* plays.

A. Wholesale Rejection Of A Derivative Evidence Principle Is Extreme And Entirely Inconsistent With The Court's Moderate, Balanced Interpretations Of *Miranda* Doctrine

Two of the possible answers to the question before the Court lie at opposite ends of the spectrum. The government advocates one of those extremes, contending that *no evidence* derived from statements secured in violation of *Miranda* should *ever* be excluded no matter how closely it is connected in fact and in character to those statements. At the other end of the spectrum is another extreme–that all evidence with even the most tenuous causal link to *Miranda* violations must always be barred from trial. The answer proposed here–that derivative evidence should presumptively be excluded, but may be admissible if sufficiently attenuated–is balanced and consistent with the Court's prior decisions.[18] A presumption of exclusion whenever risks of compulsion are "unacceptably great" ensures that the freedom not to be convicted directly or indirectly by evidence forced from one's mind receives the constitutionally required protection that *Miranda* contemplates. It is based on the entirely rational view that if

18. The government's position–that evidence derived from *Miranda* violations is *never* subject to exclusion–reflects an unacceptable balance of interests. It is exceedingly generous toward law enforcement and poses much too serious threats to Fifth Amendment rights.

statements themselves pose "unacceptably great" constitutional risks, then closely connected evidence which is often equally, if not more, incriminating, can pose comparable, and equally intolerable, risks.[19] On the other hand, by permitting a showing that the connection is sufficiently attenuated to diminish the likelihood of constitutional harm, the proposed approach prevents unjustified harm to societal interests in law enforcement.

The proposed derivative evidence principle is also consistent with the Court's jurisprudence insofar as it provides less protection for *Miranda* violations than the Fifth Amendment affords in cases of "actual compulsion." When an accused establishes that he was forced to divulge his thoughts, those thoughts and all fruits are barred. Subsequently acquired evidence is admissible *only* when derived from an "'independent, legitimate source.'"[20] The government must show more than a "weakened" connection; it must show that there is *no* causal link to the compulsion and, consequently, *no* chance of Fifth Amendment damage in court.[21]

Unlike the government's extreme, a presumptive derivative evidence principle is fully consistent with precedents delineating *Miranda*'s reach. Both those prescribing the scope of exclusion and those defining the constraints on custodial interrogation have eschewed extreme answers that strike skewed balances between governmental interests and the core constitutional guarantee.

Miranda v. Arizona, 384 U.S. 436 (1966), was itself an exercise in balance and moderation. The Court could have left then-widespread custodial interrogation practices unregulated by the Fifth Amendment privilege, but rejected that approach because core values were seriously imperiled and the judiciary had been unable to prevent those perils. *See id.* at 447-48, 457-58; *see also Chavez v. Martinez*, 123 S.Ct. at 2007 (Souter, J., concurring in the judgment). On the other hand, the Court could have imposed much more restrictive constraints on custodial interrogation, such as mandatory stationhouse counsel, a bar to waiver without counsel, or a refusal to allow substitutes for the prescribed safeguards. Instead, the Court devised constitutional protections that allowed, and continue to allow, ample breathing space for custodial interrogation and the societal interests it serves.

Dickerson v. United States, 530 U.S. 428 (2000), also graphically illustrates the Court's moderation. Rejecting the radical contention that *Miranda* lacks constitutional roots and

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19. Just as it does not matter that the product of compelled testimony is nontestimonial for purposes of the Fifth Amendment itself, it should make no difference that the evidence derived from a *Miranda* violation is nontestimonial in character. It would be illogical not to adhere to that Fifth Amendment principle when defining *Miranda*'s Fifth Amendment-based doctrine.

20. *Kastigar v. United States*, 406 U.S. at 460; *see also id.* at 457 n. 43; *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. at 79 n.18. This showing is analogous to that required by the "independent source" exception to the Fourth Amendment exclusionary rule. *See Murray v. United States*, 487 U.S. 533 (1988). The showing needed to avoid exclusion under *Miranda* has similarities to the less onerous showing necessary to invoke the "attenuation" exception to the Fourth Amendment rule. *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

21. Thus, under the proposed approach, a *Miranda* violation will "not breed the same irremediable consequences as police infringement of the Fifth Amendment itself." *Oregon v. Elstad*, 470 U.S. at 309. Because the proposed presumption is rebuttable, evidence found subsequent to or by virtue of a *Miranda* violation is not "irretrievably lost." *See id.* at 312 (evincing concern that confessions would be "irretrievably lost").

could be supplanted by a congressional enactment, the Court declared that *Miranda*'s safeguards–or fully effective equivalents–are "constitutionally required" and "necessary to ensure compliance with the . . . Constitution." *Id.* at 438-39. On the other hand, the majority did not endorse an interpretation of *Miranda* that some deem most faithful to its origins–that when *Miranda*'s safeguards are not honored the Fifth Amendment erects an absolute bar to all evidence acquired. *See id.* at 447 (Scalia, J., dissenting). That interpretation would have undermined a number of post-*Miranda* rulings accommodating constitutional rights and governmental interests, decisions that the Court found compatible with the moderate balance struck by *Miranda*. *See Dickerson v. United States*, 530 U.S. at 441.

The exclusionary doctrine rulings fit and confirm the pattern. *Harris v. New York*, 401 U.S. 222 (1971), authorized narrow use of statements *only* for impeachment of an accused who elects to testify and *only* for the doubt cast on credibility. Use in the government's case-in-chief remains forbidden. In *Michigan v. Tucker*, 417 U.S. 433 (1974), the Court exhibited typical caution and restraint, confining its holding to violations predating *Miranda* and specifically refusing to address the broad question of the admissibility of fruits. *See id.* at 447. In *Oregon v. Elstad*, 470 U.S. 298 (1985), despite speculative *dicta* directed toward the derivative evidence question, the Court ultimately addressed *only* the admissibility of second confessions following complete warnings and proper waivers. *Id.* at 318. And, finally, *Withrow v. Williams*, 507 U.S. 680 (1993), rejected a claim that the precious rights safeguarded by *Miranda* exclusion should rarely be vindicated on collateral review. The suspension of Fifth Amendment protection at that stage was too extreme to attract a majority.

Significantly, all four opinions struck balances reflecting concern for *both* effective law enforcement *and*

constitutional values. In the first three, an appreciation of *Miranda*'s role in preserving those values prompted the Court to shun extremes and to cautiously trim the scope of exclusion. In *Withrow*, that same appreciation led the Court to reject a severe, dangerous constriction of *Miranda*'s vital courtroom safeguard. *See Withrow v. Williams*, 507 U.S. at 691-92.[22]

Finally, *Chavez v. Martinez*, 123 S.Ct. 1994 (2003), counsels against the suffocating limitation sought by the government and provides potent support for a presumption of exclusion. The majority's announcement that the privilege cannot be violated by official compulsion alone because the essence of that provision is shelter against *incrimination* at trial means that the focus must be upon the use of evidence in court. Just as actual compulsion is *not* the most significant event for Fifth Amendment purposes, a failure to honor *Miranda*'s dictates is *not* the most significant stage for *Miranda* doctrine purposes. *Chavez* instructs that constitutional rights are at "unacceptably great" risk *only* when the products of custodial interrogation enter the courtroom, making it all the more critical to maintain adequate protection at that pivotal stage. *Miranda*'s constitutionally necessary shelter for a fundamental

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22. Although the discussion has focused on *Miranda*, *Dickerson*, and the exclusionary rule opinions, a cursory examination of just a few decisions defining the safeguards applicable to custodial interrogation confirms the Court's balanced attitude toward *Miranda*. *See, e.g.*, *Minnick v. Mississippi*, 498 U.S. 146 (1990) (rejecting the view that *any* consultation with an attorney removes the impediment to waiver erected by a request for counsel's assistance, but not endorsing the view that after a request for assistance waiver is impossible without counsel); *Rhode Island v. Innis*, 446 U.S. 291 (1980)(eschewing both the view that *only* express questioning can constitute interrogation and the notion that *any* words or actions by the police in a suspect's presence constitutes "interrogation"); *Michigan v. Mosley*, 423 U.S. 96 (1975)(shunning both the "absurd" contention that questioning follow an assertion of silence may resume after a "momentary respite" and the suggestion that questioning may never resume).

"trial right" must remain capacious enough to preserve the values underlying the Fifth Amendment. *See Withrow v. Williams*, 507 U.S. at 691-92.

B. The Extreme View That Evidence Derived From *Miranda* Violations Is Never Barred Shows Insufficient Respect For The Fifth Amendment And For *Miranda*'s Vital Constitutional Roles

The privilege against compulsory self-incrimination "registers an important advance in the development of our liberty–'one of the great landmarks in man's struggle to make himself civilized.'" *Ullman v. United States*, 350 U.S. 422, 426 (1956)(quoting Griswold, The Fifth Amendment Today (1955), 7). To "view" the privilege "with disfavor" and to "constrict[its] application . . . is to disrespect the Constitution." *Id.* at 428-29. To show adequate respect for the Framers' wisdom and for the liberty they prized, the privilege "must not be interpreted in a hostile or niggardly spirit," *id.* at 426, but, instead, must remain "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

Because *Miranda* is rooted in the Fifth Amendment and furnishes "constitutionally required" protection "'necessary to insure compliance with the . . . Constitution,'" *Dickerson v. United States*, 530 U.S. at 438-39, "hostile or niggardly" interpretations of *Miranda* can also betray disrespect for the Constitution itself.[23] The Fifth Amendment privilege plays a "fundamental role in our legal system," *Chavez v. Martinez*, 123 S.Ct. at 2016 (Kennedy, J., concurring in part and

23. *See Minnick v. Mississippi*, 498 U.S. 146, 155 (1990) ("Vagaries" in *Miranda* protection can "lead to a . . . loss of respect for the underlying constitutional principle"); *Oregon v. Elstad*, 470 U.S. at 365 (Stevens, J., dissenting)(exceptions to *Miranda*'s exclusionary rule can "denigrate[] the importance of . . . [a] core constitutional right[]").

dissenting in part), and the courtroom bar to evidence obtained in violation of *Miranda* provides essential protection against government practices endangering that role. The denial of any protection against derivative evidence–an excessively permissive approach that eliminates a significant part of *Miranda*'s constitutionally required shelter–"can only diminish a celebrated provision in the Bill of Rights." *Id.* at 2015.[24]

Finally, "*Miranda* has . . . become part of our national culture." *Dickerson v. United States*, 530 U.S. at 443. The doctrine plays a significant symbolic role, proclaiming that in our free society law enforcement is constrained in its laudable efforts to convict the guilty. *Miranda* also plays a vital pragmatic role in our criminal justice system, safeguarding the core Fifth Amendment entitlement not to be compelled to incriminate oneself. For these reasons, *Miranda*'s "requirements . . . merit . . . respect." *Withrow v. Williams*, 507 U.S. at 695. Adoption of the view that the courtroom shield begins and ends with the presumptively compelled statements would demonstrate palpable disrespect for *Miranda*'s vital roles, sending an unfortunate message to the people and to law enforcement. Such an indefensibly stingy interpretation would suggest that the reaffirmation of *Miranda*'s constitutional status in *Dickerson* was disingenuous and would invite a new era of

24. Dissenting from the *Chavez* majority's decision to confine Fifth Amendment protection to the courtroom, Justice Kennedy warned that a "Constitution survives over time because the people share a common, historic commitment to certain simple but fundamental principles which preserve their freedom. Today's decision undermines one of those respected precepts." *Chavez v. Martinez*, 123 S.Ct. at 2015 (Kennedy, J., concurring in part and dissenting in part). These words would apply with equal force to a decision holding that *Miranda*'s "constitutional standards for protection of the privilege," *Dickerson v. United States*, 530 U.S. at 440, provide absolutely no shelter against the use of incriminating derivative evidence.

confusion over the nature and status of *Miranda* protections.[25] Moreover, it would announce that *Miranda*'s constitutional limitations are easily circumvented. Respect for the priceless right that *Miranda* safeguards would surely be the casualty.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

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25. In contrast, adoption of a rebuttable derivative evidence presumption will reinforce the *Dickerson* majority's view that "the Constitution *does . . . require* a procedure that is effective in securing Fifth Amendment rights," *Dickerson v. United States*, 530 U.S. at 441 n.6 (emphasis added), further clarifying *Miranda*'s constitutional character and eliminating some of the post-*Dickerson* confusion in the lower courts.

[redacted] (10)

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Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

SAMUEL FRANCIS PATANE,

Respondent.

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Petition for a Writ of Certiorari to the
The United States Court of Appeals
for the Tenth Circuit

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INTEREST OF AMICUS CURIAE[1]

The Brennan Center for Justice, established in 1995 to honor the legacy of Justice William J. Brennan, Jr., is a nonpartisan institute dedicated to scholarship, education and legal action to promote human dignity and fundamental freedoms. Its criminal justice program promotes policies to serve communities affected by crime and to meet legitimate law enforcement needs while preserving constitutional values.

SUMMARY OF ARGUMENT

Unlike the typical *Miranda* cases of thirty or twenty years ago, the present case and many others now coming before the courts do not involve the unavoidable errors of police officers who trip over technical details. Increasingly, courts are being confronted with police officers who deliberately flout the *Miranda* procedures or inexplicably disregard its most basic requirements. Though described to this Court as a narrow problem concerning "derivative fruit," the issue presented—as the court below recognized—goes to the heart of whether American police will continue to respect the *Miranda* safeguards in day-to-day interrogation practice.

The facts of this case make these stakes concrete. The *Miranda* violations were substantial and inexcusable. This Court has never, post-*Miranda*, permitted prosecutors to make affirmative use of direct physical fruits under such circumstances. And as the court below understood, such police misconduct, whether characterized as intentional or inexcusably negligent, cannot be condoned without sending a clear signal that courts no longer consider compliance with *Miranda* to be an important part of routine police procedure.

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

To support reversal of the judgment below, the Government seeks a substantial reorientation of long-settled *Miranda* jurisprudence. The Government argues that deterrence of future police misconduct should be discarded as a goal of the *Miranda* exclusionary rule, that *Miranda* should be understood *solely* as a guide to admissibility decisions at trial, and that its purpose "is not to regulate out-of-court conduct by *the police*." Brief for the United States ("Br. U.S.") 29-32.

This approach is bad law and bad policy. It conflicts with decades of *Miranda* precedent and with well-settled understandings of *Miranda* in the law enforcement community and within our wider national culture. To destabilize the foundations of *Miranda* at this late date, and so closely on the heels of this Court's recent reaffirmation of that decision, would cloud the public legitimacy that *Miranda* now confers on police interrogation practices. A new approach in which this Court permits police to exploit their own intentional or negligent disregard of *Miranda* will inevitably promote public cynicism about law enforcement and indeed about the law itself.

At the day-to-day level, an approach that rejects traditional attenuation principles and gives the voluntariness test new importance would generate significant practical problems. It would damage law enforcement by creating uncertainties for police and disrupting the practices they have successfully used to adapt to *Miranda*. It would also complicate judicial suppression decisions; in the present case, as in every future case involving a *Miranda*-fruits question, courts would be required to rule on difficult voluntariness issues that *Miranda* was meant to avoid.

A decision to reverse the judgment below will also require this Court to decide whether to impose *any* limit on the use of derivative evidence. If the fruits of deliberately disregarding *Miranda* are to be excluded, courts considering the admissibility of derivative evidence will have to resolve two subjective inquiries—one focused on the state of mind of the suspect and another focused on that of the officer. But a decision that avoids that result—by permitting use of fruit

obtained by deliberate disregard of *Miranda*—would generate corrosive cynicism about law enforcement. Even if the Government's new conception of *Miranda* were theoretically sound, the public reverberations of a decision permitting intentional departures from *Miranda* cannot be overlooked. In our national culture, the *Miranda* ruling, now a potent symbol of legitimacy in law enforcement, would become a highly visible example of legal sleight of hand.

Although this Court has been reluctant to adopt rules turning on subjective police intent, any rule that condones deliberate flouting of *Miranda* is even more troubling. This Court can avoid both difficulties, however, simply by holding that *Miranda*-fruits issues are governed by the traditional fruits analysis of *Wong Sun v. United States*, 371 U.S. 471, 483 (1963), and its progeny.

There is no legitimate law enforcement need for anything more. The flexible *Wong Sun* tests leave ample room for considering independent source, inevitable discovery, and a fact-specific attenuation analysis that weighs the seriousness of a *Miranda* violation and subsequent circumstances that dissipate the taint. This approach, developed over more than four decades, has successfully protected the integrity of constitutionally based standards while making reasonable allowance for legitimate law enforcement interests. It is sound law and good law enforcement policy to reaffirm this well-understood approach.

ARGUMENT

I. The Admitted *Miranda* Violations In This Case Were Substantial And Inexcusable.

This case involves three distinct violations of *Miranda v. Arizona*, 384 U.S. 436 (1966). Patane was led from his home in handcuffs, after being arrested for allegedly violating the terms of a restraining order. Joint Appendix ("J.A.") 46. Detective Benner, who was present to pursue a separate weapons-possession investigation, then began reading Patane his *Miranda* rights. When Patane interrupted to say that he knew his

rights, Benner stopped reading the warnings. He did not ask Patane whether he was willing to answer questions but instead immediately began his interrogation, telling Patane, "I need to talk to you about the gun." J.A. 47. Benner's stated reason for not completing the *Miranda* warnings was: "I was just trying to calm him down, because once outside the home he was very upset." *Id.* (internal page reference omitted).

Benner's failure to complete his recitation of the warnings violated one of *Miranda*'s best known and most elementary rules—the mandate to give warnings prior to *all* custodial interrogations. Even when a defendant thinks he knows his rights, automatic warnings are necessary to obviate debates about whether he knows, for example, that he has the right to have counsel present if he desires. *Miranda* is emphatic on this point: "[W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed . . . can never be more than speculation; a warning is a clearcut fact." 384 U.S. at 468-69. Every moderately well-trained officer knows that complete warnings are required even when the arrestee is a lawyer or another police officer, or when the suspect says he has heard the warning "a million times before." *United States v. Bland*, 908 F.2d 471, 472 (9th Cir. 1990).[2]

Second, Benner proceeded to question Patane without obtaining a waiver. A valid *Miranda* waiver may be implied, but "[a] waiver cannot be presumed simply from the fact that *Miranda* warnings were given and a confession was eventually obtained." *United States v. Ramirez*, 710 F.2d 535, 542 (9th Cir. 1983). The standard procedure after warning the suspect is for the officer to ask whether he wants to say anything. *Id.* But here, none of Patane's words or actions—as Benner himself described them—indicated a willingness to speak before Benner began to interrogate Patane. J.A. 47.[3]

[2] *Accord United States v. Longbehn*, 850 F.2d 450, 453 (8th Cir. 1988) (although arrestee was a police officer, "[t]he requirement of *Miranda* warnings is not contingent either upon a defendant's actual or presumed knowledge of his rights"); *United States v. Espinosa-Orlando*, 704 F.2d 507, 514 (11th Cir. 1983) (although suspect told DEA agents that he understood his rights, "it must under *Miranda* be presumed that he was unaware of his right to appointed counsel"); *State v. DeWeese*, 582 S.E.2d 786, 796 (W. Va. 2003) ("[A] defendant cannot, as a matter of law, waive the reading of the *Miranda* warnings.").

Third, *Miranda* makes clear that an arrestee must not be "threatened, tricked or cajoled into a waiver." 384 U.S. at 476. But here, as Patane got "more upset about the domestic violence complaint," Benner told him that "to get in front of the domestic violence case, he needed to be truthful regarding the location of his firearm." J.A. 47, 48. Only then did Patane tell Benner that the firearm was in his bedroom and give permission for Benner to retrieve it. Whether Benner's statement was true or false (and there is nothing in the record to indicate that it could have been true), the statement unambiguously indicates that silence would put Patane at a legal disadvantage—he would not be able to put the domestic violence case behind him. If construed as a threat of adverse consequences, such a statement is "an egregious violation of *Miranda*." *Collazo v. Estelle*, 940 F.2d 411, 418 (9th Cir. 1991). But even if given a more benign interpretation, any representation that remaining silent will put the suspect at a disadvantage is a form of cajolery that *Miranda* specifically prohibits *prior* to waiver.[4]

Nor was there any plausible excuse for these missteps. Benner did not fear for his safety, did not bother to conduct a search incident to arrest, and did not worry that the gun was on Patane's person or within his reach. J.A. 47, 52. He acknowledged that no

[3] Though not phrased as a question, Benner's statement clearly constitutes interrogation, as the government concedes. Br. U.S. 9. *See Rhode Island v. Innis*, 446 U.S. 291 (1980).

[4] *See United States v. Pinto*, 671 F. Supp. 41, 59 (D. Me. 1987) (waiver invalid because of "explicit representations that it would be in defendant's best interest to cooperate"); *Commonwealth v. Gibbs*, 520 Pa. 151, 155, 553 A.2d 409, 411 (1989) ("[p]romises of benefits or special considerations, however benign in intent," render waiver invalid).

emergency prevented him from continuing to read Patane his rights. J.A. 47. Rather, Benner's stated reason for interrogating Patane without warnings—his perception that Patane was "very upset"—reflects a complete failure to understand *Miranda* and its importance for dispelling the inherently compelling circumstances of custodial interrogation. The Government does not (and could not) claim that Benner's conduct was objectively reasonable.[5]

II. No Decision Of This Court Has Ever Condoned The Affirmative Use Of Evidence Derived From A Substantial, Inexcusable Disregard Of *Miranda*.

Some lower courts, extrapolating from passages in *Michigan v. Tucker*, 417 U.S. 433 (1974), and *Oregon v. Elstad*, 470 U.S. 298 (1985), have allowed prosecutors to use derivative fruit of a *Miranda* violation, even in the absence of circumstances attenuating the taint. Yet *Tucker* and *Elstad*, read in their context, do not support any significant departure from ordinary attenuation principles.

Tucker involved an interrogation in violation of *Miranda*'s rules, which led police to a witness whose testimony was challenged as fruit-of-the-poisonous-tree. In holding that the witness's testimony was admissible, this Court stressed as "significant to our decision" the fact that the officer had conducted the questioning before *Miranda*, and therefore that the deterrent effect of exclusion would be minimal. *Tucker*, 417 U.S. at 447-48. The Court declined "to resolve the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded," noting that "we instead place our holding on a narrower ground." *Id.*

[5] The Government's only attempt to mitigate the seriousness of Benner's mistakes is its unsupported and conclusory assertion that the failure to give complete warnings was "[not] such culpable conduct as to warrant suppressing . . . the gun." Br. U.S. 34.

Elstad was likewise a fact-specific decision. Relying on numerous factual particulars,[6] this Court found that the alleged causal connection between the *Miranda* violation and the defendant's later statement was "speculative and attenuated at best." *Elstad*, 470 U.S. at 313-14. In such a situation, this Court concluded that the criteria of *Wong Sun* were sufficient to explain why the initial taint was purged. *Elstad*, 470 U.S. at 311 ("The warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.'" (quoting *Wong Sun v. United States*, 371 U.S. 471, 483 (1963))). Rejecting the charge that it was establishing a broad exception to ordinary fruits analysis, the Court noted that, "[f]ar from establishing a rigid rule, we direct courts to avoid one; . . . the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect . . . ." *Elstad*, 470 U.S. at 318. The court below did precisely that.

III. The Fifth Amendment And Its Supporting Doctrines Prohibit Affirmative Use Of Evidence Obtained By Violating The *Miranda* Safeguards.

Miranda created a system of constitutionally based procedures to protect Fifth Amendment rights. That system has always been understood to involve two distinct sets of requirements. *Miranda* establishes procedures that police are obliged to follow in custodial interrogation, and it establishes an exclusionary rule both to deter violations of those procedures and to insure respect for Fifth Amendment evidentiary principles at trial.

Each of these requirements independently mandates the exclusion of derivative evidence from the prosecutor's case-in-chief. The *Miranda* rules

[6] The *Elstad* Court emphasized that the *Miranda* violation was at worst a minor and debatable one, 470 U.S. at 315-16, the officers did not exploit the unwarned admission, *id.* at 316, and the later statement was a voluntary choice preceded by complete warnings, *id.* at 312-13.

applicable to the police are constitutional commands and, as such, they require remedies sufficient to insure compliance. In every context where this Court has recognized constitutionally obligatory rules of police conduct, it has always concluded that the exclusion of derivative evidence is essential to deter violations effectively. Similarly, the *Miranda* evidentiary rule applicable at trial, like the underlying Fifth Amendment privilege, makes sense only if it denies prosecutors the ability to make affirmative use of evidence obtained or presumptively obtained by "compulsion" to speak.

A. The *Miranda* Rules Applicable To The Police Are Constitutional Commands, And Prosecutors Therefore May Not Make Affirmative Use Of Evidence Obtained By Intentionally Or Negligently Disregarding Them.

The Fifth Amendment serves a "complex of values," *Miranda*, 384 U.S. at 460 (citing *Murphy v. Waterfront Commission*, 378 U.S. 52, 94 (1964)), and many of them are implicated only at trial. But no discussion of *Miranda*'s goals can omit mention of the Court's concerns about degrading treatment of arrested suspects, and the impairment of public respect for law enforcement that ensued. A central purpose of the Self-Incrimination Clause had always been to remove the incentive for brutality and other grave violations of individual dignity that history had shown to be inevitable when law enforcement can gain evidentiary advantage from compelling an individual to speak. *Murphy*, 378 U.S. at 55. The *Miranda* Court saw the policies underlying the Fifth Amendment as pointing to "one overriding thought: . . . the respect a government—state or federal—must accord to the dignity and integrity of its citizens." *Miranda*, 384 U.S. at 460. Yet the vague voluntariness test had failed to protect that aspiration. In the setting of police interrogation, the Court concluded, "The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and

to physical force and torture." *Escobedo v. Illinois*, 378 U.S. 478, 489 (1964) (quoting 8 J. Wigmore, Evidence 309 (3d ed. 1940)). For the *Miranda* Court, interrogation as then practiced put at risk "the inviolability of the human personality." *Miranda*, 384 U.S. at 460.

Accordingly, as the *Miranda* Court concluded, a more robust framework for effectuating the Fifth Amendment privilege was needed. The Court announced rules for proper interrogation procedure and *required* police to follow them. That understanding of *Miranda* has been a constant of this Court's *Miranda* jurisprudence for nearly four decades. The great majority of police departments understand that the *Miranda* requirements are addressed directly to them, and they have long since adjusted to those requirements. Compliance with *Miranda* in day-to-day police practice no longer impedes effective crime control; indeed *Miranda* offers substantial benefits for responsible law enforcement.

Nonetheless, the Government argues that deterrence of future police misconduct should be discarded as a goal of the *Miranda* exclusionary rule and that *Miranda*'s "purpose, as properly understood . . . is not to regulate out-of-court conduct by *the police*." Br. U.S. 29-32. That view of *Miranda* is unsupportable. The *Miranda* rules are requirements that police are not free to ignore, and effective enforcement of that mandate requires the exclusion of evidence gained by disregarding it.

1. *Miranda* Established Rules That Police Are Obliged To Follow.

This Court's *Miranda* opinion used unmistakably clear language to announce that police were thereafter *required* to follow certain now-familiar procedures in every custodial police interrogation. *See Miranda*, 384 U.S. at 477 ("The principles announced today deal with the *protection which must be given* to the privilege against self-incrimination *when the individual is first subjected to police interrogation.*") (emphasis added); *id.* at 478-79 ("[W]hen an individual is taken into custody

. . . and is subjected to questioning, . . . *[p]rocedural safeguards must be employed.*") (emphasis added).

Subsequent decisions of this Court discuss *Miranda* in the same terms. Under those decisions, failure to comply with *Miranda* not only triggers an exclusionary rule at trial, but is considered *misconduct* that the evidentiary rules are intended to deter.[7]

New York v. Quarles, 467 U.S. 649 (1984), is clear on this point. Discussing the need for a public safety exception to *Miranda*, this Court focused on whether the officer's actions were improper at the time they occurred. *Id.* at 654-55 ("[T]he only issue before us is whether Officer Kraft was justified in failing to make available to respondent the procedural safeguards."). The Court stressed the need for police to have understandable rules so that they could know, at the moment of confronting a suspect, what steps they were permitted to take.[8] Nowhere does *Quarles* suggest that *Miranda*'s procedures are optional; on the contrary, the Court recognized a "narrow exception to the *Miranda*

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[7] *Tucker*, 417 U.S. at 447 ("The deterrent purpose of the [*Miranda*] exclusionary rule necessarily assumes that *the police* have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.") (emphasis added); *Quarles*, 467 U.S. at 656 (*Miranda* "was based in large part on this Court's view that *the warnings which it required police to give* . . . would reduce the likelihood that the suspects would *fall victim to constitutionally impermissible practices of police interrogation* . . . .") (emphasis added); *Dickerson v. United States*, 530 U.S. 428, 440 n.6 (2000) (*Miranda*'s decision to "*require police* to administer the particular *Miranda* warnings" would no longer apply if a jurisdiction adopted other, equally effective procedures) (emphasis added).

[8] *Quarles*, 467 U.S. at 658 ("[W]e recognize here the importance of a workable rule 'to guide police officers, who have only limited time and expertise to reflect . . . in the specific circumstances they confront.'" (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979))); *id.* at 659 ("The exception which we recognize today, far from complicating the thought processes and the *on-the-scene judgments of police officers*, will simply free them to *follow their legitimate instincts when confronting situations* presenting a danger to the public safety.") (emphasis added).

rule"; there was "no violation of *Miranda* in this case," *id.* at 658, 660 n.9, and therefore no misconduct to deter.

The view that police are required to comply with *Miranda*, and that it is wrong for them to do otherwise, is widely shared by the legal profession, the law enforcement community, and the general public. *See* Samuel Walker, *Taming the System: The Control of Discretion in Criminal Justice* 52 (1993) ("Every junior high school student knows . . . the principle that there are [*Miranda*] limits on police officer behavior, and penalties for breaking those rules."); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. Crim. L. & Criminology 621, 679 (1996) (to the general public, *Miranda* "communicat[es] that there are moral and constitutional limits on the methods we will permit police to engage in during official questioning").

The isolated examples cited by the Government, in which police can question without warnings, Br. U.S. 33 n.9, are not to the contrary. The Government's reliance upon *Quarles* is particularly inapt. The point of *Quarles* is not that it is permissible for police to *disregard Miranda* but the altogether different principle that in situations involving public safety, the *Miranda* procedures do not apply. The Government's other examples, (interrogation aimed at terminating an ongoing kidnapping or extortion), fall within the same public safety exception. The Government's examples show only that the constitutionally based rules governing police interrogation have been and will be refined over time; such examples are themselves antithetical to the Government's novel theory that the *Miranda* procedures are not binding on the police at all.

Nor does *Chavez v. Martinez*, 123 S. Ct. 1994 (2003), wipe away these long-settled understandings. In *Chavez*, four members of this Court concluded that the core Fifth Amendment privilege is violated only when compelled evidence is introduced at trial, 123 S. Ct. at 2001 (opinion of Thomas, J.), but that view is not sufficient to support the reinterpretation of *Miranda* that the Government urges here.

First, five members of the Court either reached the opposite conclusion, *id.* at 2013 (Kennedy, J.,

concurring and dissenting), or expressed no view on the issue, *id.* at 2006-07 (Souter, J., concurring) (concluding only that out-of-court compulsion, if it does violate the Fifth Amendment, should not give rise to a civil damage remedy). Second, *Miranda* provides prophylactic protection for both the Fifth Amendment privilege and the Fourteenth Amendment voluntariness requirement; no member of the *Chavez* Court rejected the possibility that abusive interrogation, if it "breaks the will," could violate Due Process at the time it occurred[9]—a principle that finds ample support in past and contemporary understandings of ordered liberty.[10]

Finally, even if the Fifth Amendment can be violated only when evidence obtained by compulsion is introduced at trial, the Government here *does* seek to use evidence at trial, and therefore the issue that split this Court in *Chavez* is simply not relevant in this case. As we show in Section III.B, *infra*, there is an "unacceptably great" risk, *Dickerson v. United States*, 530 U.S. 428, 442 (2000), that findings under the voluntariness rubric will fail to identify situations of actual compulsion and thus will lead courts to allow affirmative use of evidence that *Kastigar v. United States*, 406 U.S. 441 (1972), requires to be suppressed. Indeed, *Miranda* proceeds on precisely this basis.

It is therefore no surprise that even after *Chavez*, lower courts continue to insist that where *Miranda*'s rules apply, it is *mis*conduct for police to disregard them. *See, e.g., State v. Knapp*, 666 N.W.2d 881, 899

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[9] *E.g., Chavez*, 123 S. Ct. at 2005 (opinion of Thomas, J.) ("[D]eprivations of liberty caused by the most egregious official conduct, may violate the Due Process Clause.") (internal quotations omitted).

[10] *Watts v. Indiana*, 338 U.S. 49, 55 (1949) ("[T]he Due Process Clause *bars police procedure* which violates the basic notions of our accusatorial mode of prosecuting crime *and* vitiates a conviction based on the fruits of such procedure.") (emphasis added). *Cf. Ireland v. United Kingdom*, 2 EHRR 25 (1978) (inhuman or degrading treatment is categorically prohibited, regardless of the use to be made of any information obtained); *Public Committee Against Torture v. State of Israel*, H.C. 5100/94 (Israel S. Ct., 1999) (same).

(Wis. 2003) (admitting evidence obtained by disregarding *Miranda* "would minimize the seriousness of the police misconduct . . . and encourage the type of conduct that *Miranda* was designed to prevent"). Similarly, Justice Marvin Baxter notes, concurring in *People v. Neal*, 31 Cal. 4th 63, 90-91, 72 P.3d 280, 297-98 (2003):

> [R]efusal to extend the exclusionary sanction of *Miranda* to impeachment evidence is not founded upon any notion that it is legitimate for the police to interrogate a suspect in custody despite his demand for counsel. . . . It could not be clearer that efforts to gather court evidence by such means are improper. . . . [I]t is unconscionable for police departments or supervisors to give contrary instruction or encouragement to the officers under their jurisdiction. . . . Officers must be made aware that *they have an absolute obligation to play by the rules* . . . . There can be no suggestion . . . that improper interrogation tactics are required, encouraged, approved, condoned, or tolerated.

Id. (emphasis added).

2. Absent Attenuation, Exclusion Of Derivative Physical Evidence Is Necessary To Deter Objectively Unreasonable Disregard Of *Miranda*'s Constitutionally Mandatory Rules.

Effective enforcement of *Miranda*'s interrogation rules requires the exclusion of evidence gained by disregarding those rules. If police and prosecutors can make affirmative use of the unattenuated fruits of a *Miranda* violation, their incentives to avoid such violations will inevitably be weakened. The Government's argument to the contrary, Br. U.S. 33-35,

defies common sense and all known conceptions of rational police behavior.

As this Court noted in *Tucker*, the Fourth Amendment exclusionary rule serves "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Tucker*, 417 U.S. at 446 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). This deterrence rationale was inapplicable on the facts of *Tucker* because Tucker's confession had been taken prior to *Miranda*, but the *Tucker* Court nonetheless noted that "in a proper case this [deterrence] rationale would seem applicable to the Fifth Amendment context as well." *Id.* at 447.

It is true, as the Government stresses, Br. U.S. 35, that an exception allowing affirmative use of derivative fruit would not lead police officers to ignore *Miranda* (or other constitutional rules) in *all* cases. But the relevant concern is whether allowing affirmative use of derivative fruit will lead officers to ignore constitutional rules in a significant *portion* of their cases. The present case illustrates why such situations would arise frequently in connection with *Miranda*. Detective Benner's sole concern was to investigate a weapons-possession offense. In that setting, a rule allowing affirmative use of derivative fruit gives an officer everything to gain and nothing to lose by ignoring *Miranda*. If he gets a statement, he can locate and use the weapon; the inadmissibility of the statement itself becomes irrelevant.[11] Similar incentives to ignore *Miranda* may not be decisive in every such case, but they can have substantial influence in investigations for possession of firearms or stolen goods, and in any situation where the suspect may know the location of

[11] The only defense available in such a case would be an attempt to deny knowledge of the weapon's existence, but in that event the defendant's statement would be admissible to impeach his denial. *Harris v. New York*, 401 U.S. 222 (1971). As the court below correctly noted, allowing the agent to testify about the location of the weapon is in every practical respect identical to allowing him to testify about the statement itself. *United States v. Patane*, 304 F.3d 1013, 1027 (10th Cir. 2002).

important tangible evidence. *See* David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 Ohio St. L. J. 805, 846 (1992) ("Police officers seeking physical evidence are not likely to view the loss of an unwarned confession as particularly great when weighed against the opportunity to recover highly probative nontestimonial evidence.").

Incentive effects are especially important in the case of *Miranda*'s cut-off requirement. The practice of continuing to press for answers when a suspect refuses to talk was probably the single most important source of interrogation abuses under the voluntariness test. Accordingly, *Miranda*'s most important measure for preventing such abuses is its rule that when a suspect invokes his right to remain silent, "the interrogation must cease." *Miranda*, 384 U.S. at 474.[12] Yet in this common situation (roughly 20% of felony arrestees invoke their right to silence[13]), investigators who can use derivative fruit have *no* incentive to comply with *Miranda*: suppression of any resulting statement would leave them no worse off than if they had honored the suspect's decision to remain silent, and derivative evidence obtained through the tainted statement would be fully admissible. Under a rule allowing use of unattenuated fruit, incentives to respect the *Miranda* cut-off rule are virtually non-existent.

There is no need to speculate about these points. As the court below noted, there are a "multitude of reported cases" in which officers *intentionally* violated *Miranda* in order to procure derivative evidence. *See United States v. Patane*, 304 F.3d 1013, 1027 (10th Cir. 2002) (citing cases). Indeed, law enforcement officials who assume the admissibility of derivative fruit often *train* their investigators to interrogate without reading the warnings (*Missouri v. Seibert*, No. 02-1371), or to ignore a suspect's decision to remain silent (*People v. Neal*, *supra*). Without a rule barring use of derivative

[12] This requirement is easy to comply with, because the request must be unambiguous. *See Davis v. United States*, 512 U.S. 452 (1994).

[13] Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 276 (1996).

fruit, the only safeguard against overreaching in such situations is the unsatisfactory voluntariness standard; the predictable result—intensive questioning despite a suspect's pleas to be left alone— has lead to the very sorts of inhumane treatment that *Miranda* was intended to discourage. *See, e.g., People v. Neal, supra.* Measured against these concrete examples, the Government's claim that "suppression of the unwarned statement itself . . . is a sufficient deterrent," Br. U.S. 33, rings hollow.

In *every* area of police practice governed by constitutional rules, this Court has concluded that incentives for compliance will be insufficient unless non-attenuated derivative evidence is excluded from the prosecution's case-in-chief. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (illegal search); *Brown v. Illinois*, 422 U.S. 590 (1975) (illegal arrest); *Weatherford v. Bursey*, 429 U.S. 545 (1977) (intrusion on attorney-client trial preparation); *United States v. Wade*, 388 U.S. 218 (1967) (lack of counsel at line-up); *Nix v. Williams*, 467 U.S. 431 (1984) (lack of counsel at post-arraignment questioning); *cf. Nardone v. United States*, 308 U.S. 338 (1939) (wiretap in violation of statute). In *every* such area, moreover, the rules excluding derivative evidence apply not only to intentional violations but also where, as here, police conduct is unreasonable. In all of these settings, this Court has recognized that allowing police to profit from negligent mistakes would put a premium on ignorance and poor training rather than encouraging reasonable efforts to learn and comply with constitutional rules.[14]

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[14] This case affords no occasion to address the effect of a *reasonable* mistake about *Miranda* rules that are technical or difficult to apply. Because attenuation principles already give weight to the reasonableness of an officer's mistake, there may be little need for a different analytic framework in that setting. More to the point, however, this case presents no occasion to consider that problem because by any measure, Detective Benner's conduct violated clear, well-established rules.

B. The Miranda Rights Applicable At Trial Require That Tainted Derivative Evidence Be Excluded From The Prosecutor's Case-In-Chief.

It is well settled that the Fifth Amendment requires the exclusion at trial of compelled, self-incriminatory statements and all evidence derived from such statements. *Kastigar v. United States*, 406 U.S. 441 (1972). This exclusionary principle serves several Fifth Amendment values. Although the compulsion used to obtain a confession normally casts no doubt on the reliability of derivative physical evidence, the Fifth Amendment is not concerned solely or even principally with reliability. *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961).

Among the "complex of values" underlying the Fifth Amendment, *Miranda*, 384 U.S. at 460 (citing *Murphy*, 378 U.S. at 94), two in particular explain the exclusion of physical fruit. First, the Self-Incrimination Clause is intended to block government from gaining an evidentiary advantage by forcing an individual to speak. *Murphy*, 378 U.S. at 54-55. Such evidentiary advantage results not only when prosecutors use the compelled statement itself but equally when they use physical evidence derived from it. *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

Second, the Self-Incrimination Clause was intended to prevent brutality and other inhumane interrogation tactics. *Murphy*, 378 U.S. at 55 (noting "our fear that self-incriminating statements will be elicited by inhumane treatment and abuses"). Again, allowing affirmative use of derivative physical evidence would create incentives for such behavior just as certainly as allowing use of the confession itself. Thus, it is universally accepted that the rule excluding testimonial evidence is equally applicable to reliable physical evidence, whenever the statement leading to that evidence was unambiguously compelled. *Chavez v. Martinez*, 123 S. Ct. 1994, 2002 (2003) (opinion of Thomas, J.) ("[T]hose subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived

from their statements) in any subsequent criminal trial.").

In *Miranda*, this Court adopted rules intended to avoid the "unacceptably great" risk that statements obtained by custodial interrogation will be involuntary. *Dickerson v. United States*, 530 U.S. 428, 442 (2000). The *Miranda* framework conserves judicial resources and avoids the need for judges to resolve issues under the "useless" or "perplexing" voluntariness rubric. *Miller v. Fenton*, 474 U.S. 104, 114 n.4 (1985). Its goal is to provide assurance that Fifth Amendment values are served: that a defendant's forced mental cooperation has not helped build the prosecution's case and that the possibility of an inaccurate finding of "voluntariness" will not tempt investigators to use inhumane or degrading methods. *Murphy*, 378 U.S. at 54-55.

Dickerson reaffirmed that if police disregard the *Miranda* procedures, compulsion is conclusively presumed when courts determine the admissibility of a resulting confession in the prosecutor's case-in-chief. 530 U.S. at 442. Once that much is acknowledged, Fifth Amendment principles afford no basis for treating derivative evidence differently.

The Government seeks to exempt derivative evidence from the exclusionary principles of *Miranda* and *Dickerson* by emphasizing that derivative physical evidence is normally reliable. Br. U.S. 26-27, 35-37. But as *Dickerson* holds, *Miranda*'s presumption of compulsion remains irrebuttable, and statements taken in violation of *Miranda* must be suppressed, even when reliability concerns are absent, as when corroborating physical evidence proves that the presumptively coerced statements are true. 530 U.S. at 442. Under the Government's narrow, reliability-centered conception of the Fifth Amendment, that result is incomprehensible; indeed the Government fails to explain how, under its reliability-centered conception, *Kastigar* could have required the suppression of reliable physical evidence derived from demonstrably compelled statements. The Government's approach, if sound, requires reconsideration of *Dickerson* and of *Kastigar* itself.

The Government's approach is not sound, however, for the simple reason that the primary concern of the Fifth Amendment is not reliability but the need for a "comprehensive safeguard" to prevent forced mental cooperation and reduce the temptation for investigators to use brutal or degrading methods. *Kastigar*, 406 U.S. at 460. To be sure, *Miranda* goes beyond situations of clear compulsion to those involving unacceptable *risks* of compulsion. But those risks threaten Fifth Amendment values in the same ways that proven compulsion does. A risk of compulsion entails a corresponding risk that prosecutors will reap gains from forced cooperation and that investigators hoping for such gains will slide toward the use of inhumane methods. *See Quarles*, 467 U.S. at 656 (noting *Miranda*'s premise that warnings "would reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation . . . .").

Because those risks are present even when the risk of unreliability is not, it is undisputed that *Miranda*'s presumption of compulsion remains irrebuttable when determining the admissibility of an unwarned but demonstrably reliable confession. *Dickerson*, 530 U.S. at 442. The relevant considerations are identical when a prosecutor seeks to make affirmative use of reliable physical fruit—the problems posed by the elusive, error-prone voluntariness inquiry and the danger to Fifth Amendment values are the same for derivative evidence as they are for a fully corroborated confession.[15]

The considerations change, as do the applicable exclusionary rules, when the prosecution seeks to introduce tainted evidence for impeachment purposes. A demonstrably compelled statement and its fruits are inadmissible, *New Jersey v. Portash*, 440 U.S. 450 (1979), but absent a finding of actual compulsion, an unwarned statement and its fruits can be used to

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[15] Whether the issue concerns clearly compelled or presumptively compelled confessions, it is not plausible to suggest that the scope of Fifth Amendment protection should depend in accordion fashion on which, or how many of the underlying Fifth Amendment concerns are implicated.

impeach, *Harris v. New York*, 401 U.S. 222 (1971). In the latter situation, the interest in preventing perjury justifies the effort to determine actual compulsion under all the circumstances, *id.* at 225, and the prospect of impeachment use has few of the deterrence costs associated with allowing use of tainted evidence in the prosecutor's case-in-chief. Therefore, in the impeachment context, *Miranda*'s presumption of compulsion is set aside, as *Harris* holds, not only for derivative evidence but for the unwarned statement itself. Conversely, where affirmative use is at issue, the need for *Miranda*'s presumption of compulsion, acknowledged in *Dickerson*, has precisely the same force for derivative evidence as for unwarned statements.

In short, Fifth Amendment values apply in the same way to presumptively compelled statements as they do to derivative evidence, and it is necessary to bar the affirmative use of both, except when the prosecution can establish an independent source, inevitable discovery or attenuation.[16]

IV. Allowing Police To Exploit Their Own Objectively Unreasonable Conduct Will *Hinder* The Interrogation Process, Cause Difficulty For Investigators And Courts, And Offer No Significant Benefits For Responsible Law Enforcement.

A decision reversing the result below, even if it does not embrace the Government's ambitious reinterpretation of *Miranda*, will have important symbolic and practical consequences. Such a decision will cloud the perceived legitimacy of closed-door interrogation and promote public cynicism about whether legal norms are binding when law enforcement officials themselves are affected. For police and courts, such a decision will destabilize the procedures they

[16] These standard exceptions to the exclusionary rule apply even in core cases of Fifth Amendment compulsion. *See Darwin v. Connecticut*, 391 U.S. 346, 349 (1968); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 277 (1983) (Blackmun, J., concurring).

have used to adapt successfully to *Miranda* and will reestablish the vague voluntariness standard as the principal check on interrogation practices in many frequently recurring situations. There is no legitimate law enforcement need to incur these costs, because *Wong Sun* attenuation principles already afford ample room for flexible, common sense resolution of derivative evidence issues.

A. A Decision Permitting Police To Exploit Their Own Negligence Will Impair The Perceived Legitimacy Of Law Enforcement, And Promote Public Cynicism About The Law Itself.

Experienced law enforcement leaders believe that the *Miranda* rules governing police practices are appropriate and that they offer substantial benefits for law enforcement. *See* Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. Crim. L. & Criminology 621, 672 (1996). *Miranda* procedures are less difficult for police officers to follow than the voluntariness test. *Dickerson*, 530 U.S. at 443-44. By assuring the public that police must operate within defined rules, *Miranda* provides legitimacy to the process of interrogation behind closed doors; it has given a generation of Americans confidence that if brought to the police station for questioning, we have the right to remain silent and that the police will respect our choice to exercise that right. Leo, *supra*, at 671-72; *id.* at 680 ("[T]he institutions of law enforcement have not only successfully adapted to . . . *Miranda*, but have publicly embraced *Miranda* as a legitimating symbol of their professionalism and commitment to fairness in the criminal process.").

The Government appears to argue that even if this Court preserves *Miranda*'s direct applicability to the police, a decision authorizing affirmative use of derivative evidence would not undercut the integrity of the rules governing interrogation. Br. U.S. 33-35. Yet the Government nowhere explains how a decision permitting direct exploitation of objectively unreasonable conduct could avoid having exactly that

effect, particularly when it would be a decision with the public visibility that attaches to a decision of this Court.

The ordinary person knows as well as any lawyer that a legal norm has little meaning if those ostensibly bound can reap direct benefits from their unreasonable failure to respect it. Accordingly, wherever constitutionally based rules seek to prevent a form of police misconduct, this Court consistently requires the suppression of unattenuated derivative evidence. *See* Section III.A.2, *supra*. Indeed, the Government quickly concedes that "[t]he government's primary argument is that . . . the police do not engage in misconduct by questioning without providing the warnings." Br. U.S. 33. The Government's disclaimers notwithstanding, its subsidiary argument for permitting exploitation of unreasonable practices necessarily rests on the Government's refusal to accept the principle that the underlying conduct is wrong.

Yet whether one approves of *Miranda* or not, "*Miranda* [is] a constitutional decision of this Court." *Dickerson*, 530 U.S. at 432. Nothing would be more destructive of law enforcement legitimacy, and indeed of the overall credibility and fairness of our legal system, than for this Court to announce that although the *Miranda* rules are constitutionally required, police can gain affirmative benefit from unreasonable failures to follow them. *See State v. Knapp*, 666 N.W.2d 881, 899 (Wis. 2003) (admitting evidence derived from failure to comply with *Miranda* would "breed contempt for the law"). As Justice Marvin Baxter stresses, concurring in *People v. Neal*:

> In a free society, we place the police in a position of unique power, but only on condition that they will do their best to uphold the law . . . . Their ability to function effectively depends upon their credibility in that role. . . . When the police dishonor proper procedures [mandated by *Miranda*], community respect for the police, and for the law itself, is undermined.

31 Cal. 4th at 91, 72 P.3d at 298.

B. A Decision To Reject Traditional Attenuation Principles In The Case Of *Miranda*-Fruits Would Generate Significant Practical Problems.

Several new problems will emerge with any rule permitting police to use evidence derived from a "voluntary" statement. Routine police practices will be destabilized. For courts, the voluntariness inquiry will again become the framework for judicial suppression decisions whenever affirmative use of derivative fruit is sought. Added to the subjective state-of-mind inquiry mandated by the voluntariness requirement will be a new subjective inquiry into the state of mind of the police officer, in order to assure that his objectively unreasonable disregard of *Miranda* was not deliberate. To be sure, that inquiry could be avoided if this Court is willing to condone deliberate disregard of *Miranda*, but that step would replace a small difficulty with a far larger one, aggravating the concerns about law enforcement legitimacy already described. *See* Section IV.A, *supra*.

1. A Rule Permitting Affirmative Use Of Derivative Evidence Would Destabilize The Routine Practices That Police Have Used To Adapt Successfully To *Miranda* and Damage The Effectiveness Of Routine Interrogation Practices.

One of *Miranda*'s most important objectives was to avoid the vagaries of the voluntariness test and provide clear guidance, so that police would know on-the-spot exactly what they must do to assure the admissibility of evidence obtained by interrogation. *Dickerson*, 530 U.S. at 444; *Quarles*, 467 U.S. at 658.

The Government's approach would dilute that objective by half. *Miranda* would continue to give police clear guidance concerning the admissibility of *statements* obtained by interrogation, but to assess the admissibility of derivative evidence obtained by interrogation, police would once again be required to assess voluntariness.

To be sure, statements will be the dominant concern in many law enforcement contexts. But in others, statements will just as surely be secondary or of no importance, compared to the fruit they can generate. This case involves just such a situation, and there are others in frequently recurring law enforcement contexts. *See* Section III.A.2, *supra*. And even when an officer's preference would be to obtain an admissible statement, that goal plays no significant role in the 20% of felony cases in which a suspect invokes his right to silence.[17] In such situations, the voluntariness framework would become the only guide for determining how hard an interrogator may press his suspect to reveal incriminating details.

In all of those contexts, the Government's proposed approach would recreate the world that *Miranda* sought to avoid, one in which officers "fac[e] a continu[al] risk that valuable evidence would be lost." *Tucker*, 417 U.S. at 443. Nearly forty years of successful police adaptation to *Miranda* would be exchanged for a complex system combining *Miranda* and voluntariness guidelines in a new and at best uncertain way.

In many ways, such a system will *hinder* police efforts to conduct successful interrogations. Because the *Miranda* rules reassure suspects that they can cut off an unwanted interrogation at any time, *Miranda* encourages many suspects to let down their guard and try to provide an exculpatory story. *See* David Simon, *Homicide* 197-202 (1991). Although *Miranda* has reduced inappropriate interrogation pressure, the confession rate has not suffered.[18] Adapting to *Miranda*, interrogation methods have changed for the better; today, suspects typically confess not because of fear of mistreatment but primarily because of misplaced

[17] *See* n.13, *supra*.

[18] Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 280-81 (1996); George C. Thomas III, *Plain Talk About the Miranda Empirical Debate*, 43 UCLA L. Rev. 933 (1996); John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 Stan. L. Rev. 1147 (1998).

confidence in their ability to talk their way out of trouble.[19]

These benefits of *Miranda* for responsible law enforcement depend crucially on public awareness that the *Miranda* procedures are binding on the police and will be followed consistently. And that is precisely how *Miranda* is currently understood. *See Dickerson*, 530 U.S. at 443 ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."). A decision by this Court announcing that the *Miranda* rules *do not* govern the police is not only unsupportable in law, as we have shown, *see* Section III.A.1, *supra*, but such a decision would jeopardize *Miranda*'s law enforcement benefits as certainly as if this Court had simply overruled *Miranda* three years ago. *See* Leo, *Impact of Miranda*, *supra*, at 680 ("[T]he symbolic message . . . — that police can disregard constitutional rights when interrogating criminal suspects—would cause a backlash of resentment against, and more distrust of, American police.").

2. Judicial Suppression Decisions Would Be Burdened By The Elusive Inquiry Into Voluntariness.

In every case involving a *Miranda*-fruits question, courts would be required to determine whether the initial statement was "voluntary." Indeed that issue remains open in this case itself. J.A 85, 86. Voluntariness inquiries require time-consuming evidentiary hearings and remain difficult to resolve even outside the pressured environment in which police officers operate. *See Miller v. Fenton*, 474 U.S. 104, 114 n.4 (1985) ("The voluntariness rubric has been variously condemned as useless, perplexing, and legal double talk.") (internal quotations and citations omitted). In addition to its "totality of the circumstances"

[19] Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 Crime, L. & Soc. Change 35 (1992); Peter Carlson, *You Have the Right to Remain Silent*, Washington Post, Sept. 13, 1998, at 6.

component, the voluntariness test also includes a number of disparate rules that hold certain interrogation tactics impermissible per se, regardless of circumstances. *See* Catherine Hancock, *Due Process Before Miranda*, 70 Tulane L. Rev. 2195 (1996). The resulting "cornucopia of Due Process tests," *id.* at 2237, gives little guidance and is "more difficult than *Miranda* . . . for courts to apply in a consistent manner." *Dickerson*, 530 U.S. at 444.

3. Suppression Decisions Would Be Additionally Burdened By The Need To Determine Whether The Disregard Of *Miranda* Was Deliberate.

The Government's proposed reinterpretation of *Miranda*, if accepted in its entirety, would allow affirmative use of derivative evidence even when an officer deliberately chose to violate *Miranda*. But short of that step, which we discuss below, *see* Section IV.B.4, a rule admitting the fruit of unreasonable disregard of *Miranda* would require a court to find not only that the initial statement was "voluntary," but also that the disregard of *Miranda* was not intentional. Suppression hearings would therefore require two subjective inquiries, one concerning the suspect's state of mind and a second concerning that of the officer.

Determinations of subjective police intent are by no means impossible and are familiar to this Court in a number of contexts. *See Whren v. United States*, 517 U.S. 806, 812 (1996) (exemption from the probable cause requirement in inventory and administrative searches "is not accorded to searches that are not made for those purposes."). In situations involving interrogation post-indictment, a Sixth Amendment right-to-counsel claim requires proof that the government "deliberately elicited" information. *Brewer v. Williams*, 430 U.S. 387, 400 (1977). That intent inquiry has not proved unmanageable.[29]

Nonetheless, intent inquiries are more time-consuming and difficult than the straightforward inquiry into whether police conduct was objectively reasonable. Intent inquiries are also less useful in enabling officers to know what is expected of them in the future. These concerns have led this Court to focus in most law enforcement contexts on objective reasonableness. That has been the touchstone not only for Fourth Amendment inquiries, *Whren*, *supra* (justification for arrest); *Florida v. Bostick*, 501 U.S. 429 (1991) (forcible stop); *Graham v. Connor*, 490 U.S. 386, 397 (1989) (excessive force), but for Fifth Amendment *Miranda* inquiries as well, *Oregon v. Mathiason*, 429 U.S. 492 (1977) (custody); *Innis*, *supra* (interrogation). If, as we argue, preservation of a viable *Miranda* system requires this Court to stop short of an unbounded derivative-evidence exception, a requirement of objective reasonableness offers a simpler and more familiar means to constrain that exception than an inquiry focused on a police officer's subjective good faith.

4. A Rule Permitting Police To Use The Fruits Of Deliberate Disregard Of *Miranda* Would Create Unacceptable Risks Of Brutal Or Degrading Interrogation Treatment And Would Place Intolerable Strain On The Perceived Legitimacy Of The Law Enforcement System.

The admissibility of evidence obtained through deliberate disregard of *Miranda* is the principal issue presented in *Missouri v. Seibert*, No. 02-1371, and will be fully argued there. Here it suffices to make the simple point that has been clear to state judges who see first hand the results produced when police believe they have the power to flout *Miranda* deliberately.

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[29] Compare *United States v. Henry*, 447 U.S. 264 (1980) (finding intent to elicit), with *Kuhlman v. Wilson*, 477 U.S. 436 (1986) (finding no intent to elicit).

Investigators who view *Miranda* in that way have too often pursued overbearing interrogation tactics to the point of breaking a suspect's will and inflicting serious abuse. *See, e.g., People v. Neal*, 31 Cal. 4th at 82-83, 72 P.3d at 291-92. Official willingness to flout *Miranda* "[undermines] community respect for the police," *id.* at 91, 298 (Baxter, J., concurring), and "breed[s] contempt for the law," *Knapp*, 666 N.W.2d at 899. A decision permitting intentional departures from *Miranda* would transform *Miranda* from a famous symbol of legitimacy in law enforcement to a landmark example of legal double talk.

C. There Is No Legitimate Law Enforcement Need To Allow Affirmative Use Of Evidence Derived From Unreasonable Disregard Of *Miranda*.

The loss of reliable evidence becomes a serious concern whenever constitutional rules are so technical and obscure that officers who want to comply with them are unable to do so. If that were true of *Miranda*, this would be a different case, and indeed *Dickerson* itself might have been decided differently. But for more than twenty years this Court has rejected that complaint. This Court's view, amply supported by empirical study,[21] is that "[t]he meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures." *Innis*, 446 U.S. at 304 (Burger, C.J. concurring); *Dickerson*, 530 U.S. at 443.

This is not to say that reasonable mistakes in applying *Miranda* can no longer occur. But that problem is not presented in this case, and as we have urged, there is no need for this Court to speculate now about how best to resolve it. *See* note 14, *supra*. In contrast, where regard of *Miranda* was objectively unreasonable, constitutional norms and sound principles of law enforcement administration offer strong reason to "compel respect for the constitutional guaranty in the only available way—by removing the incentive to disregard it." *Elkins*, 364 U.S. at 217.

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[21] *See* n.17, *supra*.

The flexible *Wong Sun* tests leave ample room for accommodating legitimate law enforcement needs in such instances. The *Wong Sun* approach considers independent source, inevitable discovery, and a fact-specific attenuation analysis. In assessing attenuation, courts typically weigh such factors as the passage of time, the existence of intervening events, whether the violation was intentional, and whether the derivative evidence was obtained by deliberate exploitation of initial misconduct.[22]

Application of this well-settled approach to the present case is straightforward. Detective Benner set out to find Patane's firearm, and he got Patane to reveal its location by an inexcusable violation of *Miranda*'s most elementary requirements. He then used the information obtained to go directly to the place where the weapon was kept, seize it, and use it in a way that was in every respect equivalent to using the statement itself. A legal system that accepts the inadmissibility of the statement cannot justifiably make affirmative use of its fruit under these circumstances.

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[22] *See* Wayne R. LaFave, Jerold H. Israel and Nancy J. King, Criminal Procedure 502-23 (3d ed. 2000).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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